Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

GAETANO VASTOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether on remand from this Court for further consideration in light of *United States v. Ojeda Rios*, 495 U.S. 257 (1990), the court of appeals disregarded that decision by holding that a *post hoc* explanation for failing to comply with the immediate sealing requirement of 18 U.S.C. § 2518(8)(a) may be supplied for the first time on remand and holding that an objectively unreasonable mistake of law may nevertheless be a "satisfactory explanation" for the failure?

2. Whether under 18 U.S.C. § 2518(8)(a), which provides that a satisfactory explanation for the absence of a seal on tape recordings of intercepted communications "shall be a prerequisite" for the "use" of the communications, an explanation for a delay in sealing tapes already used at trial may be supplied following conviction and appeal, years after suppression proceedings in which the Government failed to provide an explanation?

3. Whether the court of appeals, in remanding the case to the district court, correctly held that permitting the Government to offer a belated explanation for the sealing delay is a matter committed to the district court's "discretion"?

4. Since this Court held in *United States v. Ojeda Rios* that a misunderstanding of the law can be a satisfactory explanation for a sealing delay only if "objectively reasonable," once the court of appeals found here that the government attorney's "explanation was not objectively reasonable" was suppression required without further inquiry?

QUESTIONS PRESENTED

5. Whether the dissenter in the court of appeals was correct in stating that "[i]f the government's evidence in this case is sufficient to carry its burden of providing a 'satisfactory explanation' for failing to comply with the immediate sealing requirement of the statute, the requirement is reduced to a precatory entreaty"; "it is clear from *Ojeda Rios* that Congress intended something more"; and "[t]o hold that this record suffices to carry the government's burden under *Ojeda Rios* would effectively eliminate that burden and would ill serve the privacy concerns underlying the sealing requirement of the statute"?

6. Does a reviewing court's combined application of the presumptions of *Powell v. United States*, 469 U.S. 57 (1984), and of *Griffin v. United States*, 502 U.S. 46 (1991), to surmise *both* that the jury must have based its inconsistent RICO guilty verdict on a sufficient number of predicate offenses *and* that those predicate offenses must have been the ones supported by sufficient evidence, offend due process and diminish the right to trial by jury by increasing exponentially the risk the jury did not find sufficient evidence of guilt?

7. Under RICO, what constitutes conspiring with others to participate in the affairs of the enterprise, particularly where, as here, evidence of actually participating with those others in the affairs of the enterprise is held to be insufficient and where a requisite predicate is itself a conspiracy, one in which Petitioner did not agree to commit an unlawful act himself?

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are reported at 25 F.3d 164, 989 F.2d 1318, 915 F.2d 865 and 899 F.2d 211, and are reprinted in the appendix at App. 1, App. 27, App. 58, and App. 89, respectively. The opinions of the district court are reported at 830 F.Supp. 250, 772 F.Supp. 1472, and 670 F.Supp. 1244, and are reprinted in the appendix at App. 163, App. 177 and App. 203, respectively. An opinion of the district court rendered from the bench is printed in the appendix at App. 295.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1994, and Petitioner's petition for rehearing was denied on June 16, 1994. This petition for a writ of certiorari is filed within ninety days of the order denying rehearing, in compliance with Rule 13 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1962 provides in pertinent part:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Title 18, United States Code, Section 2518(8)(a) provides:

> The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge

issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

STATEMENT OF THE CASE

1. Petitioner was indicted in 1986 in the District of New Jersey for federal racketeering offenses. The Government's trial proof would consist principally of tape recordings of conversations intercepted pursuant to court orders.

2. In his pretrial motions, filed in May 1987, Petitioner moved to suppress certain of those recordings on the grounds that the Government had failed to comply with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, specifically 18 U.S.C. § 2518(8)(a), by either submitting the tapes immediately to a judge for sealing or providing a satisfactory explanation for not doing so. At issue were 185 reels of tape recordings intercepted pursuant to an order obtained on March 15, 1985, and two orders of extension. The eavesdropping authorized by those orders terminated on May 31, 1985, but the recordings were not presented for sealing until July 15, 1985 – forty-five days later.

In responding to Petitioner's motion to suppress, the Government, although put on notice that a satisfactory explanation for the delay was required, did not provide the actual reason and explanation for the delay. Rather, the Government maintained that suppression was not warranted, because "the law in this circuit [is] that a delay in sealing tapes is not, in and of itself, sufficient grounds for suppression as long as the integrity of the tape recordings is preserved" and, since the integrity was preserved here, "these interceptions should not be suppressed notwithstanding the delay in judicial sealing." (Gov. Memo. of Law in Opposition at 109, 112, citing *United States v. Falcone*, 505 F.2d 478, 483-84 (3d Cir.), *cert. denied*, 420 U.S. 955 (1974).) In an opinion filed September 1, 1987, the district court agreed, concluding that "the integrity of the tapes has not been questioned, and thus suppression is not mandated." App. 286.

3. On appeal from the ensuing judgment of conviction, Petitioner, citing *United States v. Ojeda Rios*, 875 F.2d 17 (2d Cir. 1989), in which certiorari had recently been granted, argued that suppression was required for unexplained delays in sealing tapes even absent a showing of actual tampering. In response, the Government volunteered no explanation for the delay and maintained that a failure to seal promptly did not necessitate suppression, citing *Falcone*. (Gov. Brf. in court of appeals at 93-94.)

On March 20, 1990, the court of appeals, citing *Falcone*, rejected Petitioner's claim. App. 151. In other respects, Petitioner's judgment of conviction was affirmed in part and reversed in part. As to a RICO violation based on participating with others in the conduct of an enterprise's affairs through collection of an unlawful debt, the court of appeals held the evidence to be insufficient. App. 120-25. Yet the court at the same

time affirmed Petitioner's conviction of a RICO conspiracy, based on conspiring with the same individuals to conduct the affairs of the enterprise through collection of the same debt, concluding that Petitioner knew the loan was unlawful and "encouraged" others to collect it. App. 125-29. The court, on a cross-appeal by the Government, also reinstated a verdict of guilt on a count charging a RICO violation based on conducting an enterprise's affairs through a pattern of racketeering activity, which the district court had set aside as irrational in light of the jury's verdict on other counts and the court's instructions.[1] App. 110-119.

4. Petitioner sought a writ of certiorari in this Court, contending, *inter alia*, that when the Government offers no satisfactory explanation for a sealing delay, the intercepted conversations must be suppressed even absent a showing that the integrity of the recordings was impaired.

Following the filing of the petition, but before the filing of the United States' responding brief, the Court decided *United States v. Ojeda Rios*, 495 U.S. 257 (1990), holding that 18 U.S.C. § 2518(8)(a) applies to a delay in sealing tapes as well as a complete failure to seal, that the "satisfactory explanation" language of § 2518(8)(a) requires the Government to explain both why a delay occurred and why it is excusable, and that the plain words of the sealing provision foreclosed any argument that proof of nontampering is a substitute for a "satisfactory explanation." *Id.* at 263-64. In so holding, the Court overruled *United States v. Falcone*, 505 F.2d 478. *Ojeda Rios*, 495 U.S. at 265 n. 5.

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[1] The court of appeals also affirmed Petitioner's convictions on two non-RICO counts for conspiring to make and conspiring to collect an extortionate extension of credit.

The *Ojeda Rios* Court next considered whether the Government had established "good cause" for the sealing delays which occurred in that case, *id.* at 265, and concluded that the excuse advanced for the first time in this Court – the supervising attorney's misunderstanding of the law with respect to the term "extension" as used in § 2518(8)(a) – was "objectively reasonable," *id.* at 266. The Court noted, however, that the sufficiency of the explanation should be made on the basis of evidence which had been presented and submissions made in the district court, and that the explanation which the Government advanced for the first time in this Court is not a "satisfactory explanation" within the meaning of § 2518(8)(a) "unless it was relied on at the suppression hearing to explain the sealing delays." *Id.* at 267. The Court therefore remanded the matter "for a determination of whether the Government's explanation to the District Court corresponded to the explanation it now advances." *Id.*

Justice O'Connor, joined by Justice Blackmun, concurred in the opinion and wrote separately to emphasize that the "satisfactory explanation" must be the actual reason for the delay presented to the district court, not a *post hoc* explanation. *Id.* at 267-68.

After the *Ojeda Rios* decision, the United States filed its brief responding to Petitioner's petition and agreed that the case should be remanded for reconsideration in light of *Ojeda Rios.* (Brf. for the United States at 8.) The United States expressly conceded both that there was a delay in sealing the tapes and that "the government did not explain the reason for the delay." (*Id.*)

By order entered June 25, 1990, the Court granted the petition, vacated the judgment and remanded the case to the court of appeals for further consideration in light of *Ojeda Rios. Vastola v. United States,* 497 U.S. 1001 (1990).

5. On remand, the court of appeals directed that the parties file briefs on the issues raised by *Ojeda Rios*. Notwithstanding the Government's previous representations, the Government now contended for the first time that there was no delay in sealing the tapes because a subsequent order to intercept communications at different premises and over different telephones was in fact an "extension" of the earlier orders and, therefore, no sealing was required until termination of the subsequent order. As a result, the sealing of the tapes at issue was not only timely, but premature!

Alternately, the Government proposed that, even if the subsequent order was not an extension, "the United States Attorney's Office" believed in good faith that it was and "[s]uch a misunderstanding is a satisfactory explanation for the alleged delay." (Gov. Brf. on Remand at 17, citing *Ojeda Rios*.) With respect to what it described as the difficult burden of demonstrating at this point in time the actual reason for the delay, the Government complained that "five years have since passed," that "all of the attorneys involved in the supervision of the wiretaps in this case have since left the United States Attorney's Office," and "Not surprisingly, memories have faded." (*Id.* at 15-16.) The Government added that "there was no reason for anyone to have a clear recollection of the circumstances surrounding the sealing of the tapes." (*Id.* at 17.) The Government therefore urged that the convictions be reinstated.

In reply, Petitioner set forth in detail the actual terms of the electronic surveillance applications and orders and the chronology of events, which exposed the Government's new contentions as baseless. In light of those incontrovertible record facts, Petitioner urged that the Government's new theory was redolent of the very kind

of explanation, offered after the fact, about which the *Ojeda Rios* Court appeared to warn. *See* 495 U.S. 267-68.

6. The court of appeals flatly rejected the Government's new contention that there was no sealing delay, stating that the court "could not possibly hold that the [subsequent] interception order was an extension of the [earlier] order" and that "the statute unambiguously rules out this possibility." App. 80.

As to the Government's alternate contention, the court of appeals stated that "we cannot now on the record before us accept the government's suggestion that, even if erroneous, the supervising attorneys' reasonable belief that the [subsequent] order of June 26, 1985, extended the original interception order satisfactorily explains the delay." App. 83. The court noted that Petitioner "understandably protest[s] that the government's belated explanation not only is unsupported by the record but contradicts its specific assertions to this court and the district court that a delay occurred but that, under *Falcone*, it could not serve as a basis for suppression because the physical integrity of the tapes remained pure." App. 83.

The court, however, speculated that "while it is possible that the government offered no explanation for the delay because it had none, it is also possible that, acting in reasonable reliance on *Falcone*, it assumed that it could defeat the suppression motion by demonstrating the integrity of the tapes and thus did not find it necessary to introduce evidence on this point." App. 84. The court, therefore, ruled:

> Accordingly, we conclude that the district court should be entitled to exercise its discretion to decide whether the government should now be permitted, under *Rios*, to offer an explanation for its violation of the sealing requirement. It seems to us that this threshold determination

> should be made by the district court rather than by us as the nature of the determination is similar to that on a ruling on a motion by the government to reopen, traditionally a discretionary matter for the district court. *See United States v. Blankenship*, 775 F.2d 735, 740-41 (6th Cir. 1985).

App. 84-85.

7. Petitioner again petitioned this Court, seeking a writ of certiorari to review the question whether, under 18 U.S.C. § 2518(8)(a) and *Ojeda Rios*, an explanation for a sealing delay may be supplied for the first time on remand as a matter of a district court's "discretion." The United States opposed the petition as raising a question not yet ripe for review since, if the district court were to exercise its discretion to foreclose an explanation or were to find the explanation not "satisfactory," the tapes would be suppressed, and if the court rejected Petitioner's arguments, Petitioner could appeal that ruling to the court of appeals and, should he obtain no relief, could petition this Court. (Brf. for the United States at 5-6.) The petition was denied. *Vastola v. United States*, 498 U.S. 1120 (1991).

8. On remand from the court of appeals, the district court conducted an evidentiary hearing on December 14, 1990, five and a half years after the sealing delay and more than three years after Petitioner's suppression motion had been decided. At the hearing the Government offered the testimony of two attorneys in private practice, Thomas Roth and Diana Armenakis. Roth, who had been out of the United States Attorney's Office for three and a half years, held the position of Deputy Chief of the Criminal Division and Chief of Narcotics during the period of January to August, 1985. Armenakis, who had been out of the Office for over five years, was responsible for the electronic surveillance in this case, her first experience with electronic surveillance. Petitioner introduced a

number of documentary exhibits during cross-examination of Roth and Armenakis. Subsequent to the hearing, the district court held that the Government was entitled to offer a belated explanation for the delay and that the explanation offered – Armenakis mistakenly thought that sealing was not required until termination of all the electronic surveillance – was satisfactory because her mistaken view of the law was objectively reasonable. App. 186-91, 199-202. The court therefore ordered Vastola's convictions reinstated.[2]

9. Petitioner again appealed, including appealing for the first time from the judgment of conviction on the RICO violation based on a pattern of racketeering activity. Petitioner asserted that, given the requirement of § 2518(8)(a) that a satisfactory explanation for the absence of a seal "shall be a prerequisite" for the use of the intercepted communication, the district court had erred in holding that the Government was free, on remand and more than five years after the fact, to offer an explanation for its violation of the sealing requirement; that the government failed to sustain its burden of proving a satisfactory explanation for the sealing delay; and that Petitioner's conviction on the RICO violation could not stand because one could not determine whether the jury had found, as required for conviction, two racketeering acts as to which there was sufficient evidence of guilt.

As to Petitioner's claim regarding the "prerequisite" requirement of § 2518(8)(a), the court of appeals held that "whatever merit this argument may have had, our case law clearly holds that the district court has the discretion

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[2] Petitioner was resentenced on the counts which the court of appeals had originally affirmed and was sentenced for the first time on the count as to which the court of appeals had reversed the district court's order setting aside the guilty verdict.

to allow the government to offer a post-conviction explanation where no explanation had been given before" and the district court had not "abused its discretion" by allowing the Government to offer its explanation for the sealing delay. App. 37, 40. However, the court went on, Armenakis' mistaken view of the law regarding sealing was *not* "objectively reasonable." App. 45. Nevertheless, the court held, an attorney's mistake of law, even though objectively unreasonable, can still be a "satisfactory explanation" for a sealing delay if "the attorney involved acted as a 'reasonably prudent' attorney to investigate the legal question involved in a reasonably prudent manner," i.e., "if the government can show that its attorney has adequately researched the law or has otherwise acted reasonably." App. 45. Since "the district court did not determine whether Armenakis conducted herself reasonably under the circumstances," the court of appeals once more vacated Petitioner's judgment of conviction and again remanded the matter to the district court, instructing it to consider "the reasonableness of Armenakis' inquiry into the law" as to the sealing of the tapes at issue. App. 46, 56-57.

The court also held that the presumptions of *Powell v. United States*, 469 U.S. 57 (1984), and of *Griffin v. United States*, 502 U.S. 46 (1991), could be applied in tandem to uphold Petitioner's RICO conviction, even though there was *both* an inconsistency between the verdict on that count and the remaining counts, suggesting that the jury did not find the requisite number of predicate acts for a RICO conviction, *and* it was also not possible to determine within the RICO count whether the jury relied on a predicate offense for which there was insufficient evidence. App. 54-55.

11. On the second remand, the district court, after briefs were submitted by the parties, held that Armenakis' inquiry into the law – admittedly inadequate research, but complemented by conversation with colleagues – was reasonable. App. 173-75. The court again reinstated the judgment of conviction.

12. Petitioner appealed once again. The court of appeals affirmed, one judge dissenting. The majority, addressing the question whether the Government had proven that Armenakis conducted adequate legal research or otherwise acted as a reasonably prudent attorney in arriving at a misunderstanding of the immediate sealing requirement, held that "Armenakis' conduct at the time in question was minimally sufficient to meet the standards of a reasonably prudent attorney." App. 13. Noting that "Armenakis' conduct is far from a model for others to follow," that "her research, standing alone, cannot be considered adequate," and that "her conversations with other attorneys, standing alone, were also insufficient," the majority nevertheless concluded that "the combined impact of these concurring sources created a degree of certainty (albeit minimal) which a prudent attorney could have accepted in arriving at an appropriate procedure for sealing." App. 9-10, 11.

The dissenter, stressing that under *Ojeda Rios* the Government bore the burden of providing a "satisfactory explanation" for its failure to comply with the immediate sealing requirement, pointed out that "the government's explanation is not 'satisfactory' as that term has been interpreted by . . . the Supreme Court in *Ojeda Rios*" and that the majority's opinion "effectively eliminate[s]" the Government's burden under *Ojeda Rios*. App. 15, 25.

Petitioner's petition for panel rehearing and rehearing in banc was denied, three judges voting to grant rehearing. App. 306-07.

REASONS FOR GRANTING THE PETITION

I

The Court of Appeals' Decision Investing The District Court with The "Discretion" to Permit The Government to Provide An Explanation for The Sealing Delay on Remand Is Contrary to The Plain Command of 18 U.S.C. § 2518(8)(a) And This Court's Holding in *Ojeda Rios*.

1. In *United States v. Ojeda Rios*, 495 U.S. 257, the Court pointed out that "[s]ection 2518(8)(a) has an explicit exclusionary remedy for noncompliance with the sealing requirement, providing that '[t]he presence of the seal provided for by this section, or a satisfactory explanation for the absence thereof, *shall be a prerequisite* for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom . . . . ' " *Id.* at 260 (footnote omitted) (emphasis added), *quoting* § 2518(8)(a). In remanding the case before it for further proceedings, the *Ojeda Rios* Court stated that the explanation offered to the Court "is not 'satisfactory' within the meaning of the statute unless it was relied on *at the suppression hearing* to explain the sealing delays." *Id.* at 267 (emphasis added). *Ojeda Rios* thus indicates, consistent with the "prerequisite" language of the statute, that the Government must explain a sealing delay *before* making use of tapes and is not permitted to supply an explanation for the first time following appeal, i.e., after the tapes have been used to obtain a conviction.

Here, the court of appeals disregarded the directive of the statute and of *Ojeda Rios* by investing the district court with the "discretion" to permit the Government to supply the actual reason and explanation for the sealing delay *after* the suppression motion was litigated, *after* the evidence had been used at trial, *after* appellate review, and *after* the court of appeals had itself declined to accept the explanation proffered to that court – albeit without

any basis in the record – following remand from this Court. The court of appeals dispatched Petitioner's claim regarding the "prerequisite" requirement of § 2518(8)(a) by stating simply that "whatever merit this argument may have had, our case law clearly holds that the district court has the discretion to allow the government to offer a post-conviction explanation where no explanation had been given before." App. 37.

Reducing compliance with the command of § 2518(8)(a) and with the holding of *Ojeda Rios* to a matter committed to a district court's "discretion" trivializes that command and eviscerates that holding. The Court in *Ojeda Rios* directed a remand solely for a determination whether the explanation offered to this Court was the same as had been offered to the district court, not to provide the Government with an opportunity to supply an explanation never given. *Ojeda Rios'* proscription of *post hoc* explanations is impelled by the plain language of the statute, i.e., that a satisfactory explanation is a "prerequisite" for use of tapes sealed untimely; by principles of waiver, i.e., the Government cannot rely on a reason not presented when the issue was first litigated, or contrary to a position previously taken, *see Steagald v. United States*, 451 U.S. 204, 208 (1981); and, presumably, by recognition of the unpleasant realities of litigation, i.e., the increased potential for creating or enhancing an "explanation" years after the event or tailoring an explanation to conform to recently articulated legal standards, and the possibility that avoidance of a retrial may incline district courts toward finding the belated explanation "satisfactory." *See United States v. Massino*, 784 F.2d 153, 159 (2d Cir. 1986) (prompt explanation for sealing delay will "avoid after-the-fact explanations for lapses actually caused by oversight or neglect and will eliminate the

need for courts to rely long after the fact upon the memories of agents as to the reasons for delays").

None of these risks are present in cases like *Ojeda Rios* itself, where the reason given at the suppression proceeding is a matter of record and cannot be created, changed, enhanced or tailored. Such a case involves a simple historical inquiry into the explanation already memorialized in the hearing transcript or government affidavits. Here, on the other hand, the Government itself, complaining on remand to the court of appeals about the difficulty of demonstrating at that point in time the actual reason for the delay, asserted that "five years have since passed," "all of the attorneys involved in the supervision of the wiretaps in this case have since left the United States Attorney's Office," "Not surprisingly, memories have faded," and "there was no reason for anyone to have a clear recollection of the circumstances surrounding the sealing of the tapes." (Gov. Brf. on Remand at 15-17.) Under these circumstances, according the district court the discretion to permit the Government to supply an after-the-fact explanation for the sealing delay – memories presumably having been restored – and then to hold that the district court did not "abuse its discretion" in permitting an explanation, is contrary to the directive of *Ojeda Rios*.[3]

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[3] The court of appeals, seemingly intimating that the *Ojeda Rios* decision was shaky, adverted to the concurrences of Justices O'Connor and Blackmun and stated that "[w]ithout these votes, *Ojeda Rios* may have been a plurality decision, as three justices dissented." App. 83 n. 18. Whatever the court of appeals' purpose in making that statement may have been, it is perplexing. First, Justice O'Connor's concurring opinion indicates that the Government should satisfy a *more* rigorous standard on remand, not a less rigorous one. Second, the *Ojeda Rios* dissenters would have affirmed the decision of the courts below

When, as it did here, this Court grants certiorari, vacates the judgment of the court of appeals and remands for reconsideration in light of an intervening decision of the Court – in this case *Ojeda Rios* – the court of appeals must heed that decision. *Hutto v. Davis*, 454 U.S. 370, 372 (1982). The court of appeals did not do so and, therefore, certiorari should again be granted, and the judgment reversed. *See id.*

2. The district court reasoned that in light of *United States v. Falcone*, 505 F.2d 478, which had held that a sealing delay did not require suppression in the absence of tampering, the Government had "no reason" to offer an earlier explanation for the sealing delay. App. 187. Thus, the court concluded, "[t]o prohibit the government from offering an explanation concerning the sealing delay as it did not present its explanation at the time of the suppression motion would be grossly unfair as *Falcone* did not require the presentation of such evidence to defeat the motion to suppress." App. 188. The court of appeals found this conclusion not to be an "abuse of discretion," agreeing with the district court's reasoning, and noting that *Ojeda Rios* was distinguishable since "[t]he government there offered a reason for the delay *before* the evidence was admitted [though a question remained as to whether the proffered explanation at trial was the same one determined to be reasonable on

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suppressing the tapes, irrespective of the Government's misunderstanding of the law. 495 U.S. at 268-70. Consequently, the opinion of the Court represents the view most favorable to the Government, not least favorable. Inferentially, if the explanation proffered for the delay was not the actual reason presented to the district court at the time of the suppression proceedings, every member of this Court would have required suppression.

appeal]" while "[t]he government here offered no explanation, choosing instead to rely on *Falcone*." App 37-38 (emphasis and bracketed clause the court's).

Petitioner submits that, even if a court were authorized to excuse noncompliance with the plainly worded requirements of § 2518(8)(a), the conclusion of the courts below fails to reckon the distinction between the Government's statutorily mandated obligation to comply with the sealing requirements of § 2518(8)(a) and the very different question of the Government's surviving a suppression motion.

Under § 2518(8)(a), an explanation for a sealing delay is required as a prerequisite to the use of tapes *even if a defendant never moves to suppress the evidence*. When tapes are sealed late, it is not uncommon for the supervising attorney to provide the sealing judge with the explanation for the delay at the time of sealing. Indeed, that happened *in this very case*, with respect to other tapes, when another Assistant United States Attorney, upon learning that two of the original tapes had not been sealed in 1985 due to a clerical error, presented them to a district court judge for sealing a year later, together with affidavits fully explaining the reason for the delay. (CA App. on initial appeal at 203-16.) This was before the indictment had even been filed and, obviously, before Petitioner had ever moved to suppress the tapes. The reason that the Assistant United States Attorney provided the explanation was undoubtedly because the statute *required* an explanation as a prerequisite to the tapes' use – regardless of any prospective suppression motion.

Thus, the district court was wholly incorrect in stating there was "no reason" to provide an explanation for the sealing delay in light of *Falcone*. The Government *had* both a reason – the statute required it as a prerequisite to the tapes' use – and the opportunity – at *any* time prior to

the tapes' use, whether by affidavit or otherwise, and regardless of any motion to suppress. Of course, the defendants' motion to suppress also gave the Government additional, specific notice to provide an explanation for the delay. *Cf. Rakas v. Illinois*, 439 U.S. 128, 130 (1978) (denying petitioners' request that, should Court reject their "legitimately on premises" argument on Fourth Amendment standing suggested by Court's earlier decisions, case should be remanded for findings on petitioners' ownership interest in seized property, and pointing out that "the prosecutor's argument gave petitioners notice that they were to be put to their proof on any issue as to which they had the burden"). To permit the Government to present its explanation years later rewards "sandbagging" – withholding an argument in order to use it in the event another argument is ultimately unsuccessful. *See Wainwright v. Sykes*, 443 U.S. 72, 89-90 (1977).

It must nevertheless be noted that if the Government, in declining to supply the reason and explanation for the sealing delay, relied to its detriment on *Falcone*, this would not excuse its default, since under no reasonable view of *Falcone* was the Government ever relieved of its statutory obligation to provide an explanation. In *Falcone*, where tapes had not been promptly sealed, the Court stated that "the tapes were not sealed in accordance with the statute" and described the delay as a "procedural error." 505 F.2d at 483. In concluding, however, that the failure to promptly seal did not necessarily require the remedy of suppression, the Court pointed out that its conclusion was supported by the fact that Congress had "provided an alternative to the sealing requirement," namely, *a satisfactory explanation*. *Id.* at 484. Indeed, the court actually noted some possible "satisfactory explanations." *Id.* As to the remedy of suppression, the Court

stated that the integrity of the tapes is the crucial factor, and that in the case before it the district court found that they had not been tampered with. *Id.* The Court, however, took care to expressly narrow its holding:

> Therefore, all we hold is that where the trial court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom.
>
> We hasten to add that *this holding, of course, does not deprecate the importance of the sealing requirement. Certainly, it should be complied with in all respects.* As this case so aptly demonstrates, compliance would have avoided considerable uncertainty and delay.

Id. (emphasis added). Thus, no one could reasonably rely on *Falcone* as dispensing with the need to furnish a satisfactory explanation for a sealing delay. *Falcone* did not hold that the Government may *either* explain the reason for a delay in sealing tapes *or* demonstrate the integrity of the tapes. The Government was required to comply with the statute, and the statute commanded, as the *Falcone* court itself expressly noted, that a satisfactory explanation be given where there had been a delay in sealing.[4] Consequently, the Government could not have justifiably relied on *Falcone* in failing to offer an explanation,

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[4] Even the Government begrudgingly acknowledged in the court of appeals that Petitioner may well be right in asserting that under *Falcone* a satisfactory explanation for a sealing delay was still required. (Gov. Brf. on second appeal at 25.) The Government's answer, however, was that it *had* an explanation, but simply did not *present* it! (*Id.*)

because *Falcone* did not relieve the Government of that duty.[5]

Knowledge of the actual reason and explanation, if any, for the failure to immediately seal the tapes was peculiarly within the province of the Government from the time of the sealing delay. Nevertheless, the Government declined to supply the explanation at the time of the suppression motion even though, ironically, it could not possibly have been unfairly prejudiced by doing so since *Falcone* – while requiring compliance with the sealing statute in all respects – did not mandate the remedy of suppression in the absence of tampering. Consequently, the district court erred in concluding that it would be "grossly unfair" to prohibit the Government from offering a belated explanation concerning the sealing delay.

3. In keeping with the statute and *Ojeda Rios*, the courts below should have rejected out of hand the Government's request to provide such an explanation, since there is simply no valid basis for treating the request as a matter committed to the district court's discretion. The court of appeals' reasoning was flawed in analogizing the Government's request to a motion by the Government to reopen, traditionally a discretionary matter for the district court. A district court's discretion to allow the Government to reopen is just another manifestation of the

---

[5] Unfortunately, the Government, at least in the Criminal Division of the U. S. Attorney's Office in Newark, took *Falcone* as a license to ignore the sealing requirements of § 2518(8)(a). Roth's testimony was very revealing in this regard. He testified that, unlike in the Eastern District of New York, where he had previously worked, sealing "was not an overwhelming concern in New Jersey" because suppression was not a viable option unless there was tampering. (CA App. on last appeal at A 43-44) The majority in *Falcone* could hardly have contemplated such a perverse application of its holding.

court's broad and time-honored power to control the mode and order of proof at trial. *See, e.g.*, Fed. R. Evid. 611(a); *Geders v. United States*, 425 U.S. 80, 86 (1976); *United States v. Blankenship*, 775 F.2d at 740-41. In such a context, the court's exercise of discretion is informed by the judge's unique overview of the trial as it has unfolded before him or her in one continuous proceeding.

Here, on the other hand, a ruling on the Government's request to supply, five years later, the actual reason and explanation for the sealing delay is not a trial matter traditionally left to a district court's discretion. Since the inquiry focuses on conduct occurring at the time of the sealing delay, which precedes even the indictment, the district court's overview of the case, and specifically the trial proof, is as beside the point as it would be if the court were deciding the objective reasonableness of a police officer's reliance on a search warrant executed before the defendant's arrest. Rather, the sealing issue is a statutory matter whose resolution must be informed by the language of the applicable statute. In unambiguously providing in § 2518(8)(a) that a satisfactory explanation for the absence of a seal "shall be a prerequisite" for the use of intercepted communications, Congress has placed such a determination beyond a district court's discretionary powers. Moreover, the passage of five years, along with the attendant changed circumstances and personnel, makes any analogy to a motion to reopen artificial.

For all these reasons, the Court should grant certiorari and hold that § 2518(8)(a) precluded the Government from providing for the first time on remand the reason and explanation for a delay in sealing tapes used at trial.

II

The Court of Appeals Further Undercut *United States v. Ojeda Rios* by Holding That The Government Attorney's Mistake of Law, Although Objectively Unreasonable, Was Nevertheless A "Satisfactory Explanation" For The Sealing Delay Because The Attorney Investigated The Legal Question In A Reasonably Prudent – Albeit Minimally So – Manner.

4. In *Ojeda Rios* the Court stated: "In establishing a reasonable excuse for a sealing delay, the Government is not required to prove that a particular understanding of the law is correct but rather only that its interpretation was objectively reasonable at the time." 495 U.S. at 266. The court of appeals found that Armenakis' misunderstanding of the law was *not* objectively reasonable. App. 45. Under *Ojeda Rios*, the inquiry should have ended there, and the tapes ordered suppressed.

The court of appeals, however, went on to add a second level of inquiry, one cutting against the first: an attorney's mistake of law, even though objectively unreasonable, can still be a "satisfactory explanation" for a sealing delay if "the attorney involved acted as a 'reasonably prudent' attorney to investigate the legal question involved in a reasonably prudent manner," i.e., "if the government can show that its attorney has adequately researched the law or has otherwise acted reasonably." App. 45. The court cited as the sole authority for this proposition its holding in *United States v. Carson*, 969 F.2d 1480 (3d Cir. 1992), another sealing delay case. *Carson* itself, however, had cited no authority and engaged in no analysis, but simply declared that proposition to be so, *Ojeda Rios* notwithstanding. *Id.* at 1494. The court of appeals' approach vitiates the holding of *Ojeda Rios* because it excuses a sealing delay based on a misunderstanding of the law unless the misunderstanding is *both*

objectively unreasonable *and* the government attorney did not act reasonably in arriving at that unreasonable misunderstanding.

Despite its apparent self-contradiction, there is some support in cases dealing with qualified immunity from suits based on Fourth Amendment violations for the idea that one can reasonably act unreasonably. *See Anderson v. Creighton*, 483 U.S. 635, 643 (1987); *Oliveira v. Mayer*, 23 F.3d 642, 649 (2d Cir. 1994). But two distinct reasonableness inquiries are being made in such cases: one into the lawfulness of the police officer's conduct and the other into the officer's entitlement to qualified immunity. As the Court in *Anderson v. Creighton* pointed out, all Fourth Amendment violations are by definition "unreasonable," but a police officer who makes an objectively reasonable determination that his conduct is lawful in executing a search or seizure should not be held personally liable for damages, even though the evidence is properly suppressed under the Fourth Amendment. 483 U.S. at 643-44.

This special compound analysis, however, has no application to the simple suppression question formulated by *Ojeda Rios*: whether, in establishing a reasonable excuse for a sealing delay, the Government has proven its misunderstanding of the law was objectively reasonable. Once it is established that the government attorney's misunderstanding was not objectively reasonable, the tapes must be suppressed, as in the Fourth Amendment context, and no further inquiry is warranted. Since the court of appeals put an inappropriate gloss on *Ojeda Rios*, which would shield violations of § 2518(8)(a) based objectively unreasonable mistakes of law, certiorari should be granted.

III

The Government Did Not Sustain Its Burden of Proving A Satisfactory Explanation for The Sealing Delay, And The Court of Appeals' Holding "Effectively Eliminate[s]" The Government Burden under *Ojeda Rios*.

5. The dissenter in the court of appeals, Judge Stapleton, stated:

> If the government's evidence in this case is sufficient to carry its burden of providing a 'satisfactory explanation' for failing to comply with the immediate sealing requirement of the statute, the requirement is reduced to a precatory entreaty. Because it is clear from *Ojeda Rios* that Congress intended something more, I respectfully dissent. App. 15.

Judge Stapleton added that "[t]o hold that this record suffices to carry the government's burden under *Ojeda Rios* would effectively eliminate that burden and would ill serve the privacy concerns underlying the sealing requirement of the statute." App. 25.

For the reasons more fully stated in the dissenting opinion in the court of appeals (App. 15-26), certiorari should be granted so that the Court can determine whether the Government sustained its burden of proving a satisfactory explanation for the sealing delay.

IV

The Presumption of *Powell v. United States*, 469 U.S. 57 (1984), And The Presumption of *Griffin v. United States*, 502 U.S. 46 (1991), Should Not Be Applied in Tandem, Because It Increases Exponentially The Risk That A Defendant Was Not Properly Found Guilty.

6. The general guilty verdict on Count One, charging a RICO violation based on a pattern of racketeering activity, was inconsistent with the verdicts on the non-

RICO counts of the indictment. Those counts alleged the same offenses charged as racketeering acts, yet the jury did not find Petitioner guilty of any count that would comprise the requisite second racketeering act. The inconsistency between the verdicts, of course, is not grounds for setting the conviction aside because, under *Powell v. United States*, 469 U.S. 57 (1984), "it is unclear whose ox has been gored," i.e., although such a verdict may mean the jury was not convinced of the defendant's guilt, it is "equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Id.* at 64-65. For prudential reasons, according to *Powell*, it must be presumed that the latter possibility occurred, and inconsistent verdicts are therefore insulated from review. *Id.* at 66-69.

Here, however, in addition to the inconsistency, nowhere in any of its verdicts, whether general or special, whether RICO or non-RICO, did the jury find that Petitioner committed any racketeering act other than a single one relating to an extortion conspiracy against an entity named MCA. Consequently, it was impossible to determine what other racketeering act, if any, the jury may have relied upon in reaching its verdict on Count One, which required a minimum of two such acts. And the evidence with respect to at least some of them was insufficient. This is also not grounds for setting Count One aside, however, because, under *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466 (1991), the jury is presumed to have convicted on a ground supported by adequate evidence,

and the possibility that the jury convicted on a ground that was not is "remote." *Id.*, 112 S.Ct. at 474.[6]

On the other hand, where there is an inconsistency between verdicts in a multi-count indictment, the inconsistency, while not in itself grounds for setting aside a verdict, at the very least cuts against a presumption that the jury acted rationally. Consequently, Petitioner submits that where an indictment alleges multiple predicates for a compound crime like RICO, the evidence must be sufficient to prove all of them if a court cannot determine which predicates the jury relied upon in reaching its guilty verdict *and* other irregularities in the verdict, for example inconsistency, reflect ambiguity or juror confusion. In such cases, unlike in *Powell*, it is no longer "equally possible" that the defendant or the Government was disadvantaged. And, unlike in *Griffin*, the chance is by no means "remote" that the jury convicted – or under *Powell* is deemed to have convicted – on a ground that was not supported by adequate evidence.

Thus, where in addition to an inconsistency *between* verdicts on different counts of an indictment, raising the possibility that the jury did not find the requisite number of predicate acts, it is also not possible to determine *within* a verdict on a compound count the specific predicate offenses the jury relied upon in reaching its verdict on that count, the risk that the jury did not properly find the defendant guilty is increased exponentially by combining the presumptions of *Powell* and *Griffin* to speculate both that the jury must have convicted on a sufficient

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[6] Indeed, under the circumstances in *Griffin*, in which the defendant was charged in only one count of an indictment, there was virtually no such chance, since nothing in the verdict indicated any confusion on the jurors' part. In short, jurors are presumed to have followed the court's instructions and acted rationally.

number of predicate offenses and that those predicate offenses must have been the ones supported by sufficient evidence. In the face of such an inscrutable verdict, this kind of far-reaching conjecture offends due process and diminishes the right to trial by jury.

The court of appeals stated, ironically, that *Petitioner's* argument "would require that we speculate about the jury's deliberation" and "we will not reverse a conviction based on speculations about the jury's rational deliberation process." App. 54, 55. But that is exactly what a court does – far more speculatively – when it upholds a conviction by combining the presumptions of *Powell* and *Griffin* and assuming that the jury acted rationally, where the verdict itself does not support that assumption. The Court should therefore grant certiorari and hold that applying *Powell* and *Griffin* in tandem creates too great a risk of a defective conviction to satisfy due process and the right to a jury trial.

V

The Distinction under RICO between Participating with Others in The Affairs of An Enterprise And Conspiring with Those Others to Participate in The Affairs of The Enterprise Is Unclear, Particularly Where A Requisite Predicate Act Is Itself A Conspiracy And The Defendant Did Not Agree to Commit An Unlawful Act Himself.

7. The court of appeals reversed one of Petitioner's RICO convictions under 18 U.S.C. § 1962(c) because there was insufficient evidence that Petitioner participated in the conduct of the alleged enterprise's affairs through collection or attempted collection of a particular unlawful debt, noting along the way that the proof also did not establish that Petitioner played a supervisory role with respect to the two individuals involved in the collection.

App. 120-25. Nevertheless, the court concluded that Petitioner could be properly convicted under 18 U.S.C. § 1962(d) for conspiring to participate in the affairs of the enterprise through collection of the same unlawful debt (App. 125-29) and further, that he could be properly convicted under 18 U.S.C. § 1962(c) for participating in the affairs of the enterprise through a pattern of racketeering activity, with the conspiracy to collect the unlawful debt furnishing one of the two requisite racketeering acts. App. 55-56. According to the court of appeals, Petitioner could be convicted on both of these RICO theories because, although he did not know the details of the loan, he "knew the loan was unlawful and with that knowledge, *encouraged* [one of the individuals] to collect it." App. 129 (emphasis added).

The court of appeals' tripartite holding raises three important, interrelated questions regarding RICO. First, since the crime of conspiracy requires not only knowledge of the conspiracy's objective, but participation in the scheme, *see Blumenthal v. United States*, 332 U.S. 539, 550 (1949), what is the distinction between participating with others in the affairs of an enterprise through collection of an unlawful debt and conspiring with those others to participate in the affairs of the enterprise through collection of that debt? Second, in order to be convicted of a RICO conspiracy must a person agree to commit personally a predicate act or merely agree to commission of the act, a question as to which the circuits are in conflict.[7]

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[7] The court of appeals in this case followed *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.), *cert. denied*, 474 U.S. 971 (1985), which held that the defendant need not agree to commit the act personally. App. 128. The Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh circuits agree. *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990); *United States v. Joseph*, 781 F.2d 549 (6th Cir. 1986); *United States v. Stern*, 858 F.2d 1241 (7th Cir. 1988);

Third, may a RICO conviction, and in particular a RICO conspiracy conviction, rest on a predicate act which is itself a conspiracy.[8]

Collectively, these questions would require the Court to determine definitively the essential elements of a RICO conspiracy. In *Reves v. Ernst & Young*, 113 S.Ct. 1163 (1993), the Court definitively construed the phrase "to conduct or participate, directly or indirectly in such enterprise's affairs," as that phrase is used in 18 U.S.C. § 1962(c). A similar authoritative construction of the phrase "to conspire to violate any of the provisions of [18 U.S.C. § 1962(a), (b) or (c)]," as used in 18 U.S.C. § 1962(d) is warranted, since both RICO indictments and RICO civil complaints routinely allege RICO conspiracies under 18 U.S.C. § 1962(d) in addition to RICO substantive violations under 18 U.S.C. § 1962(c), *see, e.g., National Organization for Women, Inc. v. Scheidler*, 114 S.Ct. 798, 802 (1994), and since the distinction, if any, between these subsections, as well as the proof required for each, is elusive. That Petitioner could be convicted of violating both subsections solely on the basis of knowing about and *encouraging* collection of a debt, even though Petitioner was found not to have participated in the conduct

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United States v. Leisure, 844 F.2d 1347 (8th Cir. 1988); *United States v. Tille*, 729 F.2d 615 (9th Cir. 1984); *United States v. Rosenthal*, 793 F.2d 1214 (11th Cir. 1986). The First and Second circuits disagree and require an agreement by the defendant to commit the act personally. *United States v. Winter*, 663 F.2d 1120 (1st Cir. 1981); *United States v. Ruggiero*, 726 F.2d 913 (2d Cir. 1984).

[8] Although the court of appeals did not expressly address this question, which was raised in both that court and the district court, the court of appeals subsequently held in *United States v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990), that a conspiracy may serve as a predicate for a RICO conspiracy. *Id.* at 1134-35.

of the alleged enterprise's affairs through collection or attempted collection of that debt or to have played a supervisory role with respect the two individuals involved in the collection, is testament to the subsections' opacity and their capacity for boundless and arbitrary application.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
August 31, 1994

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

GAETANO VASTOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX I

Filed May 25, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-5529

UNITED STATES OF AMERICA

Appellee

v.

GAETANO VASTOLA

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 86-301)

Argued March 4, 1994

Before: STAPLETON and SCIRICA, *Circuit Judges*,
and VAN ANTWERPEN, *District Judge**

(Opinion filed May 25, 1994)

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*Hon. Franklin S. Van Antwerpen, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

VAN ANTWERPEN, *District Judge.*

Appellant Gaetano Vastola ("Vastola") comes before us for the fourth time seeking to overturn his May 3, 1989 convictions for two substantive RICO offenses under 18 U.S.C. § 1962(c), a RICO conspiracy offense under 18 U.S.C. § 1962(d), and conspiracy to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. § 894. Vastola seeks suppression of certain wiretap recordings, improperly sealed under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), as amended, 18 U.S.C. § 2510 *et seq.* Vastola challenges the findings of the district court from the most recent remand in this case. *U.S. v. Vastola*, 830 F.Supp. 250 (D.N.J. 1993). Specifically, Vastola disputes the finding that the United States Attorney supervising the wiretap surveillance conducted adequate legal research or otherwise acted as a reasonably prudent attorney when she failed to seal the wiretap tapes in a timely fashion.

The history of this complex case has been well-documented in the many published opinions written in connection with this case. *United States v. Vastola*, 989 F.2d 1318 (3d Cir. 1993) (Vastola III); *United States v. Vastola*, 915 F.2d 865 (3d Cir. 1990) (Vastola II), *cert. denied*, 498 U.S. 1120, 111 S.Ct. 1073 (1991); *United States v. Vastola*, 899 F.2d 211 (3d Cir. 1990) (Vastola I), *vacated and remanded*, 497 U.S. 1001, 110 S.Ct. 3233 (1990). We will discuss only the facts and procedural history relevant to our review of the most recent remand of this case to the district court.

I.

Facts and Procedural History

On May 3, 1989 the district court entered an order of judgment and commitment against Vastola after a jury found him guilty of two substantive RICO offenses. Vastola had been charged, along with 20 other co-defendants in a 114-count indictment filed on September 19, 1986. Vastola was sentenced to serve a total of twenty years' imprisonment and to pay a total fine of $70,000.

Prior to trial, Vastola and the other defendants filed an omnibus motion that included a request for the suppression of the electronic tapes obtained from the government's surveillance of an establishment named the Video Warehouse in West Long Branch, New Jersey ("West Long Branch tapes"), between March 15, 1985 and May 31, 1985. The tapes were not sealed until July 15, 1985, more than 45 days after the final interception on May 31, 1985 and 32 days after the June 13, 1985 expiration date of the order authorizing the surveillance. Defendants contended that the West Long Branch tapes should be suppressed pursuant to the Wiretap Act, 18 U.S.C. § 2518(8)(a).[1]

---

1. Section 2518(8)(a) provides, in pertinent part:

> The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions ... The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

18 U.S.C. § 2518(8)(a).

The district court determined, in effect, that the sealing was untimely. However, the district court refused to suppress the tapes, relying on the case of *United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955, 95 S.Ct. 1338 (1975) for the rule that suppression is warranted only where it can be shown that the physical integrity of the tapes has been compromised. Finding by clear and convincing evidence that the physical integrity of the West Long Beach tapes had not been compromised, the district court denied Vastola's and the other defendants' motion to suppress. *United States v. Vastola*, 670 F.Supp. 1244, 1282 (D.N.J. 1987), *aff'd in part, rev'd in part*, 899 F.2d 211 (3d Cir.), *vacated and remanded*, 497 U.S. 1001, 110 S.Ct. 3233 (1990).

On appeal, we affirmed the district court's refusal to suppress the West Long Branch tapes on the basis of *Falcone*. *Vastola I*, 899 F.2d 211 (3d Cir. 1990). On June 25, 1990, the Supreme Court vacated this decision and remanded the matter for further consideration in light of the recently decided case of *United States v. Ojeda Rios*, 495 U.S. 257, 110 S.Ct. 1845, 109 L.Ed.2d 224 (1990). In *Ojeda Rios*, the Supreme Court held that a delay in sealing authorized electronic surveillance tapes requires suppression of the tapes unless the government offers a "satisfactory explanation" for the sealing delay. The court held that section 2518(8)(a) requires that the actual reason for the sealing delay be objectively reasonable at the time of the delay. *Ojeda Rios*, 495 U.S. at 266-267, 110 S.Ct. at 1850-1851.

On remand from the Supreme Court, this court concluded that "a sealing delay indeed occurred as the West Long Branch tapes should have been sealed either as soon as was practical after May 31, 1985, when the actual surveillance ended, or as soon as practical after June 13, 1985, when the final extension order expired." *Vastola II*, 915 F.2d 865, 875 (3d Cir. 1990). We then remanded to the district court to determine "whether the government should now be permitted, under *Ojeda Rios*, to offer an explanation for its violation of the sealing requirement." *Id.* at 876. Vastola's petition for certiorari from this decision was denied. *Vastola v. United States*, 498 U.S. 1120, 111 S.Ct. 1073 (1991).

On December 14, 1990 the district court conducted a hearing at which the government presented evidence concerning the reason for the sealing delay. The district court determined that "the actual reason for the sealing delay was that the Assistant United States Attorney in charge of the electronic surveillance, Diana Armenakis, and her supervisor on the case, Thomas Roth, believed that the Wiretap Act did not require the sealing until the end of the investigation." *United States v. Vastola*, 772 F.Supp. 1472, 1481 (D.N.J. 1991), *vacated and remanded*, 989 F.2d 1318 (3d Cir. 1993). The court found that the government's misunderstanding of the law had been objectively reasonable and the delay had perforce been satisfactorily explained." *Id.* at 1483. Accordingly, the district court reinstated Vastola's conviction, sentencing him to 17 years imprisonment.

On appeal from the order reinstating his conviction, we held that the district court had not abused its discretion by allowing the government to present evidence supporting its explanation for the sealing delay. *Vastola III*, 989 F.2d 1318, 1324-25 (3d Cir. 1993). However, relying on our earlier decision in *United States v. Carson*, 969 F.2d 1480 (3d Cir. 1992), we reversed as to the finding that the government's explanation was objectively reasonable. Nonetheless, we remanded this case for further proceedings because, as we held in *Carson*, an "unreasonable mistake of law does not automatically lead to suppression." *Vastola III*, 989 F.2d at 1327. In *Vastola III*, we discussed the *Carson* holding as follows:

> The *Carson* court explained that even though an attorney's mistake of law is unreasonable, the government can still show a satisfactory explanation if "the attorney involved acted as a 'reasonably prudent' attorney would to investigate the legal question involved in a reasonably prudent manner." 969 F.2d at 1494 ... The case [*Carson*] then stands for the proposition: When a government attorney's legal conclusion is found to be unreasonable, the explanation for the delay would still be an objectively reasonable "mistake of law" if the government can show that its attorney has adequately researched the law or has otherwise acted reasonably.

Vastola III, 989 F.2d at 1327. Since the district court did not make a determination whether Assistant United States Attorney Armenakis ("Armenakis") acted reasonably under the circumstances, we remanded for further proceedings.

The district court addressed this narrow question of attorney conduct in its published opinion *United States v. Vastola*, 830 F.Supp. 250 (D.N.J. 1993) ("*Second Remand*"). The court found that while Armenakis failed to conduct adequate research, her "reliance on the authoritative advice given by her colleagues constituted an adequate substitute for further reading of the caselaw, and her behavior was objectively reasonable under the circumstances." *Id.*, 830 F.Supp. at 256. Finding that the government had offered a "satisfactory explanation" for the failure to timely seal the West Long Branch tapes, the court held that the tapes were properly admitted at trial. Consequently, the court issued an order reinstating the convictions of Vastola.

Vastola now appeals the district court's findings, arguing that Armenakis' conduct was not objectively reasonable under the circumstances and that suppression of the surveillance tapes is warranted. For the reasons that follow, we affirm the findings of the district court.

II.

Standard of Review

We review the district court's factual findings for clear error. *Vastola II* at 1324 (quoting *U.S. v. McMillen*, 917 F.2d 773, 774 (3d Cir. 1990)). We exercise plenary review over the district court's legal conclusion that the Assistant United States Attorney's conduct was "reasonably prudent" under the circumstances. *Id.* at 1324.[2]

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2. The Government urges a highly deferential review of all aspects of the district court's opinion in this case, not just of its findings of fact; it thus argues we should use the standard of review we use for the Rule 11 determinations of a district court. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447 (1990). Because this case involves a question of the legal standard of reasonable research of a government attorney in a criminal case, and not just reasonable attorney conduct in a civil context, we find the suggested standard inappropriate.

III.

Analysis

This Court in *Vastola III* remanded to the district court on one narrow issue: Did Armenakis, in making an unreasonable mistake of law, nevertheless conduct herself reasonably under the circumstances? *Vastola III*, 989 F.2d at 1327. The answer is "yes," if the government can show that its attorney has adequately researched the law or has otherwise acted prudently. *Id.* The burden of proof is on the government to make this showing. *Vastola III*, 989 F.2d at 1327.

The relevant facts for this analysis are few in number: Armenakis studied the statute, outlined it, read its annotations, and spoke with more experienced attorneys. *Vastola III*, 989 F.2d at 1327.[3]

The district court invoked Federal Rule of Civil Procedure 11 jurisprudence to define the "reasonably prudent attorney." The district court cited *Mary Ann Pensiero, Inc.*, 847 F.2d 90, 94 (3d Cir. 1988) for the following Rule 11 standard:

> An attorney's actions will be considered objectively reasonable where, given the existing circumstances, she undertakes " 'a normally competent level of legal research' " to support the conclusion she reaches.

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3. These findings of fact were established by the district court during the first remand, *United States v. Vastola*, 772 F.Supp. 1472, 1480 (D.N.J. 1991). The district court held an evidentiary hearing in 1990, five years after the relevant conduct occurred. The district court's findings were acknowledged by the Third Circuit in *Vastola III*, and relied upon by the district court during the most recent remand. We are satisfied that they are not clearly erroneous.

The district court found in *Second Remand* that these facts provided a sufficient factual basis to decide the question of reasonable conduct. As a result, no additional evidence was taken and the district court made its rulings on these facts alone. We acknowledge that these facts are adequate for the task at hand and that further inquiry by the district court would not have produced additional relevant facts.

Second Remand, 830 F.Supp. at 254. Under the circumstances, this standard is helpful in beginning an analysis of reasonable attorney conduct. The intended goal of Rule 11 is accountability. It "imposes on counsel a duty to look before leaping and may be seen as a litigation version of a familiar railroad crossing admonition to 'stop, look, and listen.'" *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 157 (3d Cir. 1986). In this case, we are assessing the reasonableness of Armenakis' conduct and her duty to stop, look and listen while conducting a wiretap investigation.[4]

The district court found that Armenakis herself had not adequately researched the law. The court reasoned as follows:

> Armenakis' research, which consisted of reading and outlining the statute and reviewing the relevant annotations, was enough to give an average attorney a basic understanding of the law. However, standing alone, this limited investigation cannot be considered a normally competent level of research that a reasonably prudent attorney would undertake.

Second Remand, 830 F.Supp. at 255. We agree. Given the serious consequences which follow from the mistaken application of the Wiretap Act, i.e. suppression, a reasonable United States attorney should not be satisfied with a basic understanding of the Act and a summary review of applicable caselaw. In addition, as the district court reasoned, "the meaning of a complex statute, such as the Wiretap Act, is not always readily ascertainable from just the reading of the text; and the annotations often fail

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4. The analogy to Rule 11 has its limits in this context. Some of the factors relevant to determining whether an attorney has made a reasonable pre-filing inquiry into the law, (e.g., whether the position taken was a good faith effort to extend or modify the law) are not particularly helpful in determining the reasonableness of a government attorney's research of the law during an ongoing criminal investigation. *See e.g. Thomas v. Capital Security Services, Inc.*, 812 F.2d 984, 988 (5th Cir. 1987); Fed.R.Civ.Proc. 11, *Advisory Committee Note*; *Lingle*, *supra*, 847 F.2d at 95; *Schering Corp. v. Vitarine Pharmaceuticals, Inc.*, 889 F.2d 490, 496 (3d Cir. 1989).

to fully reflect how caselaw has interpreted a statutory provision." Thus, Armenakis' research, standing alone, cannot be considered adequate. The inquiry, therefore, turns on whether Armenakis otherwise acted prudently.

The district court found that Armenakis acted as a reasonably prudent attorney, and based its conclusion on the "interaction between Armenakis' own research and the authoritative confirming advice she received from other, more experienced United States Attorneys." That is, Armenakis' research, standing alone was inadequate. This coupled with the confirmation of her initial understanding of the law by more experienced colleagues, however, convinced the district court that Armenakis acted reasonably under the circumstances.[5]

We agree that when an attorney receives confirmation of legal theories from a number of proper sources, each consistent with the next, the attorney can act reasonably in relying on these theories in the course of legal research. The district court properly found that Armenakis' limited book research was inadequate. Moreover, her conversations with other attorneys, standing alone, were also insufficient. *Carson*, 969 F.2d at 1495 (an attorney may not rely merely on conversations with peers or supervisors concerning developing area of law where incorrect answer could lead to suppression of important evidence). However, we believe that the combined impact of these concurring sources created a degree of certainty (albeit minimal) which a

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5. We do not accept the district court's finding that Roth's view was the general understanding of the office. The court inferred this from the fact that Roth was Armenakis' supervisor during the Video Warehouse surveillance, and that Roth was the most experienced of any attorney in the United States Attorney's office in New Jersey with respect to interceptions. *Second Remand*, 830 F.Supp. at 256, n.6. We do not think it necessarily follows that Armenakis spoke to other attorneys with Roth's view. Since Roth would have counselled her to promptly seal the tapes after each location, such information might have better informed Armenakis about proper procedure. App. at 25. Nonetheless, we accept the finding that she spoke to more experienced colleagues, and that they confirmed her view of the law. We think it was reasonable for Armenakis to rely on these colleagues, whether or not Roth's view was the general understanding of the office.

prudent attorney could have accepted in arriving at an appropriate procedure for sealing.

From a factual standpoint, the caselaw as it existed at the time was not inconsistent with a reasonably thorough review of the relevant annotations.[6] When Armenakis conducted her legal research, no "red flags" would have appeared to warn her about the need to seal the tapes as the investigation continued but the location of the surveillance changed. Our review of the relevant annotations discloses no Third Circuit case which would have definitively clarified this issue, or even notified Armenakis of a conflict.[7] In fact, cases from other circuits could have led her in the opposite direction.[8]

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6. Just as we examined Armenakis' understanding of the law to determine whether it was objectively reasonable *at the time of the delay*, *Ojeda Rios*, 110 S.Ct. at 1851, we will also examine Armenakis' conduct at the time of the delay to determine if it was reasonably prudent attorney conduct. *Cf. Schering Corp., supra*, 889 F.2d at 496 ("the wisdom of hindsight is to be avoided; the attorney's conduct must be judged by what was reasonable to believe at the time the pleading, motion, or other paper was submitted.")

7. Of the few Third Circuit cases appearing in the relevant portions of the Federal Digest, only the *United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974) appears to be even remotely on point. In that case, the court ruled that the tapes were not sealed in accordance with the statute. However, there was no explanation of how or why the sealing failed to accord with the statute. The rule of law in *Falcone*, later overturned in *Ojeda Rios*, was as follows:

> all we hold is that where the trial court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom. We hasten to add that this holding, of course, does not deprecate the importance of the sealing requirement. Certainly, it should be complied with in all respects. As this case so aptly demonstrates, compliance would have avoided considerable uncertainty and delay.

Falcone, 505 F.2d at 484. Instead of clarifying the meaning of 18 U.S.C. § 2518(8), we held that delays in sealing would not result in suppression.

8. *See e.g. United States v. Principie*, 531 F.2d 1132, 1142, and n. 14 (2nd Cir. 1976), *cert. denied*, 430 U.S. 905 (1977) (electronic surveillance order entered 16 days after a prior order regarded as an "extension" within the meaning of § 2518 because it was considered part of the same investigation of the same individuals conducting the same criminal enterprise); *United States v. Scafidi*, 564 F.2d 633, 641 (2nd Cir. 1977), *cert. denied*, 436 U.S. 903 (1978) (where intercept is on same premises and involves substantially same persons, an extension under those circumstances requires sealing only at conclusion of whole surveillance).

An inquiry into the reasonableness of an attorney's legal research is necessarily fact and time specific. The court must take into account not only the particular methodology employed by the attorney, but also the complexity of the law at the time in question.[9] Armenakis' conduct is far from a model for others to follow and our ruling is, of course, limited to the facts and time frame of this case.

With its decision in *Ojeda Rios*, the Supreme Court significantly clarified the sealing requirements of the Wiretap Act and changed the caselaw which we use to help judge reasonable attorney behavior.[10] The Court admonished: "the seal required by § 2518(8)(a) is not just any seal but a seal that has been obtained *immediately* upon the expiration of the underlying surveillance order." *Ojeda Rios*, 110 S.Ct. at 1849 (emphasis in original). Of additional significance is the clarification of the Wiretap Act provided by section 2518(11), added to Title III as part of the Electronic Communications Privacy Act of 1986, § 106(d)(3), Pub.L.No. 99-508, 100 Stat. 1848, 1857, *reprinted in* 1986 U.S.Code Cong. & Admin.News. This provision, which authorizes roving surveillance upon a

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9. Due to the absence of controlling Third Circuit precedent, we cannot label Armenakis' conclusions "patently unmeritorious or frivolous." Only when an attorney offers such an implausible view of the law, in the Rule 11 context, would she be subject to sanctions. *See Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 194 (3d Cir. 1988); *Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551, 556 (3d Cir. 1989) (Rule 11 evaluation includes question of whether pleading was based on plausible view of the law).

10. *See* Judge Easterbrook's opinion in *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989), in which he observed:

> A lawyer who founds his suit on *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), has revealed all we need to know about the reasonableness of the pre-filing inquiry...If the legal point is obscure, though, even an absurd argument may not be sanctionable, because a "reasonable" inquiry does not turn up every dusty statute and precedent. An objectively frivolous legal position supports an inference that the signer did not do a reasonable amount of research, but an inference, no matter how impressive, is no more than an inference.

Mars Steel Corp. v. Continental Bank N.A., 880 F.2d at 932.

showing that the suspect's purpose is to thwart interception by changing facilities, was passed in 1986 and plainly discredits arguments based upon the so-called "extension theory."[11] *See Vastola II*, 915 F.2d at 874.

Vastola argues that *Carson* compels a different result. The district court cited to *Carson* for the proposition that an attorney's reliance on the counsel of more experienced colleagues can constitute reasonable attorney conduct. *See Second Remand*, 830 F.Supp. at 256. In *Carson*, the government attorney, Robins, did not immediately seal wiretap tapes after surveillance ended because he expected the same surveillance to begin again when the subject returned from a hospital stay. Robins alleged that, like Armenakis, he believed at the time that sealing was not necessary until the *entire* investigation was completed. Robins claimed that he asked his supervisor about the sealing requirements and had (mistakenly) understood his supervisor to explain that no sealing was required until all surveillance ended. The *Carson* Court found that Robins' legal conclusion regarding sealing was *not* objectively reasonable, but it remanded the case to the district court for consideration of whether Robins' reliance on what he thought the supervisor told him was reasonable without any additional, independent research. The court in *Carson* offered the following standards regarding an attorney's reliance on the counsel of colleagues:

> Arguably, a reasonable attorney would not have risked the exclusion of the tapes, evidence important to his case, without personally checking the law relating to its admission. *It is not always unreasonable for an attorney to rely on a reasoned oral opinion of a supervisor, or even that of a peer with more experience in the area of law in question.* Moreover, an attorney

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11. The court in *Vastola II* referred to the Electronic Communications and Privacy Act of 1986 in order to make a legal determination, based on the text of the statute, of the meaning of the Wiretap Act. Since the amending provision was not passed until after the relevant conduct by Armenakis, it is evident that by referring to section 2518(11) the court in *Vastola II* was not commenting upon the reasonableness of Armenakis' conduct in 1985. The court in *Vastola III* remanded this matter to the district court for a determination of the reasonableness of her conduct.

> working under another lawyer on a case could not be faulted for following instructions, as opposed to advice, from the person in charge of the case or investigation. On the other hand, we do not think that a reasonable attorney can rely on a casual conversation with a peer or supervisor concerning developing law on a complex, controversial subject if an incorrect answer is likely to preclude admission of evidence of vital importance to the case.

Carson, 969 F.2d at 1495 (emphasis added).

The district court found that, like Robins in *Carson*, Armenakis relied on the opinions of her more experienced colleagues in formulating her opinion. But unlike the attorney in *Carson*, Armenakis did more here than merely rely on these conversations.[12] Her understanding of the law was supplemented by her reading and outlining of the statute and her review of the relevant annotations at that time. Armenakis did, in fact, check the law in this case. And her reading of the law confirmed her understanding (albeit a misunderstanding) that sealing was only required at the end of the investigation. Thus, the *Carson* decision is authoritative but clearly distinguishable on its facts.

We recognize that the wiretap is a powerful and invasive law enforcement tool, and that the Wiretap Act was enacted to establish procedural safeguards which assure that "the interception is justified and that the information obtained thereby will not be misused." *Gelbard v. United States*, 408 U.S. 41, 47, 92 S.Ct. 2357, 2361 (1972) (citations omitted). Nonetheless, we hold for the reasons stated that the combined effect of Armenakis' conduct at the time in question was minimally sufficient to meet the standards of a reasonably prudent attorney.

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12. We note that the court in *Carson* did not decide the question of whether attorney Robins' reliance on what he thought his superior told him without independently checking the law might be reasonable. Thus, *Carson* leaves open the possibility than a mere reliance on a superior's understanding of the law might be reasonable in certain circumstances. Of course, in this case Armenakis conducted independent research in addition to her consultation with other, more experienced attorneys in the office.

IV.

Conclusion

For the reasons set forth above, we conclude that the order of the district court should be affirmed.

STAPLETON, *Circuit Judge*, Dissenting:

If the government's evidence in this case is sufficient to carry its burden of providing a "satisfactory explanation" for failing to comply with the immediate sealing requirement of the statute, that requirement is reduced to a precatory entreaty. Because it is clear from *Ojeda Rios* that Congress intended something more, I respectfully dissent.

Wire surveillance of the Video Warehouse in West Long Branch, New Jersey, was authorized on March 15, 1985. After two extensions, the authority expired on June 13, 1985. The surveillance actually terminated on May 31, 1985. Wire surveillance of Video's new location in Neptune City, New Jersey, was authorized on June 26, 1985. That authority ceased and the surveillance was terminated on July 25, 1985.

Duplicates of 185 reels of tape from the West Long Branch surveillance were sealed 45 days after that surveillance ceased and 32 days after the authorization terminated. When the government realized its mistake, the originals of these reels of tape were sealed a little over a month later, on August 19, 1985.

The federal wire surveillance statute, after providing for court authorized wire surveillances, stipulates the following with respect to the making and sealing of tape recordings:

> The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. *Immediately upon the expiration of the period of the order, or extensions thereof,* such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

18 U.S.C. §2518(8)(a) (emphasis supplied).

The tapes from the West Long Branch surveillance are the ones at issue here. The government has not contended that a sealing involving a 32 day or longer delay would constitute an "immediate" sealing. Rather, the government, in *United States v. Vastola*, 915 F.2d 865 (3d Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991) ("*Vastola II*"), advanced two alternative theories under which there was said to be no violation of the statute. First, it insisted that there had been no delay because the order of June 26, 1985, authorizing surveillance of the Neptune City site, was an "extension" of the original authorization, and the duty to seal did not arise until the Neptune City surveillance terminated. We rejected this argument, concluding:

> We could not possibly hold that the Neptune City interception order was an extension of the West Long Branch order. Although the government rightly points out that *Rios* [*United States v. Ojeda Rios*, 495 U.S. 257 (1990)] did not decide whether a change in the location of an illegal operation will prevent a subsequent order covering the new location from being an extension of a previous order, the statute unambiguously rules out this possibility.

Id. at 874 (footnote omitted).

In support of this conclusion, we referred to the above quoted portion of the statute and two other sections requiring that an application for wire surveillance authority justify the need for surveillance at a specific site:

> Section 2518(1)(b)(ii) plainly states that an application for surveillance order must contain 'a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted.' In addition, section 2518(3)(d) requires a particularized showing of probable cause that 'the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in the commission of [the] offense [under investigation].' Based on these two provisions alone, we would have no difficulty concluding that Congress intended for interception

> orders, and their accompanying extensions, to apply only to surveillances in the particular locations specified in the applications.

Vastola II, 915 F.2d at 874.[1] We held, based on the plain meaning of the text of the statute, that the duty to seal arises "upon the expiration of the order or extensions thereof" and that an order authorizing surveillance at another site is not an extension.[2]

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1. As the majority correctly points out, we also referred to a 1986 statutory amendment authorizing roving surveillance upon a showing that the suspect's purpose is to thwart interception by changing facilities. The "unmistakable inference" to be drawn from this amendment, we held, was that the other provisions of the statute "restricted surveillance to particular locations, regardless of whether the same suspects and crimes were involved." *Id.* at 875. The above quoted text leaves no doubt, however, that our conclusion would have been the same in *Vastola II* if we had confined our analysis to the text of the statute as it existed prior to this amendment when the surveillances in this case were conducted.

2. During our analysis of the plain meaning of the text in *Vastola II*, we pointed out that the Second Circuit case law existing at the time of the surveillance in this case did not support the view that a new authorization for surveillance at a different location could constitute an extension of a prior authorization for another site. We noted and rejected the government's contention that *United States v. Vazquez*, 605 F.2d 1269 (2d Cir. 1979), *cert. denied*, 444 U.S. 981 (1979), stood "for the proposition that the term, 'extension,' encompasses all continuation of wiretap orders involving the same crimes and substantially the same people." 915 F.2d at 874 n. 15. We indicated that "[w]e would be hard pressed to read *Vazquez* so broadly." *Id.* The *Vazquez* court summarized the state of the law in the Second Circuit in 1979 as follows:

> Therefore, we conclude that the term "extensions," as used in the phrase "period of the order, or extensions thereof" is to be understood in a common sense fashion as encompassing all consecutive continuations of a wiretap order, however designated, where the surveillance involves the same telephone, the same premises, the same crimes, and substantially the same persons. *See United States v. Scafidi*, *supra*, 564 F.2d at 641; *cf. United States v. Principie*, 531 F.2d 1132, 1142 n. 14 (2d Cir. 1976), *cert. denied*, 430 U.S. 905 (1977).

Vazquez, 605 F.2d at 1278. It is thus clear that the Court of Appeals for the Second Circuit does not read its case law in the same way the majority reads it in footnote 8, *supra*.

Having concluded that the duty to seal the West Long Branch tapes arose no later than June 13, 1985, the date the authorization for the surveillance of that location terminated, we turned to the government's second argument — i.e., its "suggestion that, even if erroneous, the supervising attorneys' reasonable belief that the order of June 26, 1985, extended the original interception order satisfactorily explains the delay" in sealing the West Long Branch tapes. *Id.* at 875. We declined to pass upon this argument because the government up to that point had tendered no evidence to the district court concerning the circumstances of the sealing delay. We remanded to the district court so that it could exercise its discretion on whether to reopen the record and allow the government to offer such evidence.

Between *Vastola II* and the time this case returned to us in *Vastola III*, we had occasion to consider another case in which a sealing delay had occurred in the context of sequential surveillance of different sites. *United States v. Carson*, 969 F.2d 1480 (3d Cir. 1992). The investigation in *Carson* was conducted in 1981 and 1982. An evidentiary hearing was held by the district court in that case at which Warren Robins, the attorney who had caused 33 of the tapes of the first, "Zax", surveillance to be sealed, testified. His testimony was summarized as follows:

> Robins discussed the sealing issue with Stewart, his supervisor, during the time in December 1981 when DiGilio was in the hospital. Although Stewart meant to convey that sealing was required at the end of a particular order or its extension, Robins understood him to mean that sealing was required only at the conclusion of the investigation, rather than at the end of interception at a particular location. Robins' misunderstanding of Stewart's advice arose, because at the time of their discussion the Zax order [authorizing the first surveillance] constituted the entire electronic surveillance operation.
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> * * * *
>
> As a result, Robins believed that the sealing obligation for all of the tapes, including the Zax tapes, arose on

> May 12, 1982 when the [second] surveillance was terminated.
>
> * * * *
>
> Robins therefore thought that so long as any part of the "wiretap interception process" was occurring, there was no requirement to seal—even if a particular wiretap operation which was a part of the investigation was complete.

Id. at 1493-95.

The district court in *Carson* concluded "that Robins' view, though wrong, was objectively reasonable and that, therefore, the government provided a satisfactory explanation for the delay." *Id.* at 1494. We rejected this conclusion based on *Vastola II*, explaining:

> In reaching this conclusion, the court accepted Robins' explanation even though it was contrary to the unambiguous language of the statute. *See id.* at 494 (quoting *Vastola II*, 915 F.2d at 874).
>
> We agree with the district court that a reasonable mistake of law can be a satisfactory explanation for delay, but we also think the district court's findings do not support its conclusion that Robins' explanation was satisfactory. For an explanation to be satisfactory under *Ojeda Rios*, it must be objectively reasonable. . . . The government does not, and cannot, argue that an objective reading of the extant case law might have caused an objectively reasonable attorney to take Robins' view.

Id. at 1494 (footnote omitted).

Although the government did not maintain that the case law would have "caused an objectively reasonable attorney to take Robins' view" on February 27, 1982 (when the final extension of the authority for the first surveillance terminated and the duty to seal was triggered), the government in *Carson* did insist that it had satisfactorily explained the delay by showing that "it was attributable to an innocent mistake on Robins' part in misunderstanding what Stewart told him." *Id.* at 1494. We acknowledged that

it was possible for the government to have a "satisfactory explanation" even though it acted on the basis of an objectively unreasonable view of the law. We held, however, that the district court's findings would not support the view that the delay occurred "without any fault on the government's part." *Id.* at 1494. We observed:

> Robins said his conclusion that the sealing requirement was not triggered until all surveillance ended was based on a misunderstanding of Stewart's oral advice on the sealing requirements. The district court made no finding as to whether Robins could have reasonably understood Stewart as telling him no sealing was required until all surveillance ended or whether it was reasonable to rely on what Stewart told him without any independent research. If a reasonably prudent lawyer could have interpreted Stewart's statements as Robins did and, under all the circumstances, reasonably relied on them without any independent investigation of the law, Robins' explanation as to the March 9, 1982 delay would be an objectively reasonable mistake of law that satisfactorily explains the government's failure to meet the statute's requirement of immediate sealing. Affirmative answers to those two questions of fact are necessary to a determination that Robins' mistake of law was objectively reasonable. . . .

Id. at 1494.

We ultimately remanded the *Carson* case to the district court to determine "whether Robins' explanation was satisfactory and objectively reasonable." *Id.* at 1501. In doing so, we made the following cautionary observations that are very pertinent here:

> The circumstances of this case may show that Robins had an affirmative duty to do more than rely on the advice of his superior. Arguably, a reasonable attorney would not have risked the exclusion of the tapes, evidence important to his case, without personally checking the law relating to its admission. It is not always unreasonable for an attorney to rely on a reasoned oral opinion of a supervisor, or even that of a

> peer with more experience in the area of law in question. Moreover, an attorney working under another lawyer on a case could not be faulted for following instructions, as opposed to advice, from the person in charge of the case or investigation. *On the other hand, we do not think that a reasonable attorney can rely on a casual conversation with a peer or supervisor concerning developing law on a complex, controversial subject if an incorrect answer is likely to preclude admission of evidence of vital importance to the case. . . .*

Id. at 1495 (emphasis supplied).

Carson, like *Ojeda Rios*, makes clear that the government bears the burden of persuading the court that its explanation is "satisfactory."

On remand from *Vastola II*, the district court allowed the government to introduce additional evidence concerning the circumstances of the surveillance and the sealings. Based on that evidence, the district court concluded that "the actual reason for the sealing delay was that the government attorneys in charge of the surveillance believed that sealing was not required until after the entire investigation." More specifically, Assistant United States Attorney Armenakis, the decision maker in this case, had "form[ed] the same mistaken belief held by Attorney Robins in *Carson*." *United States v. Vastola*, 989 F.2d 1318, 1323 (3d Cir. 1993) ("*Vastola III*").

In *Vastola III*, we, of course, held that Armenakis' view of the law was not "objectively reasonable." *Id.* at 1327. This holding was required by *Carson* and, indeed, was the law of the case in this proceeding after *Vastola II*. Those cases establish that a reasonable attorney who had reviewed the text of the statute with even a minimal degree of care could not have reached the conclusion that Armenakis did.

Since the record supported the finding that Armenakis' view of the law was the "actual reason" for the sealing delay, if that view had been objectively reasonable, that would have ended the matter in the government's favor; there would have been no occasion to inquire into the historic facts of how Armenakis reached her conclusion. This court's conclusion that her view was not objectively

reasonable did not end the matter in the defendant's favor, however, because the government contended that Armenakis, even though wrong, acted reasonably under all the circumstances in reaching her erroneous conclusion. Relying on *Carson*, we held that this was a tenable position for the government to take, but concluded that the district court had not made the findings necessary to sustain it. We remanded so that the district court could "determine whether Armenakis conducted herself reasonably under the circumstances." *Id.* at 1327.

On remand from *Vastola III*, the parties stipulated that the existing record was adequate to enable the district court to make the required findings. That record consisted of a hearing at which Armenakis and her immediate supervisor, Thomas Roth, testified. Roth testified that he recalled no conversation with Armenakis regarding the sealing of the tapes in this case. While not required under his understanding of the law in the spring of 1989, if he had been asked by Armenakis, he would have counseled that "the more prudent way to do it, and the way [he] always did it [was to seal] when any particular facility was terminated." Appendix at 25.

Armenakis testified that she had had no prior experience with wire surveillance and that she received no formal training in that area with respect to this case. Her *entire* testimony with respect to how she reached her view of the law on sealing was as follows:

> Q. Did it occur to you to seal the interceptions that had commenced in March and had ceased at the end of May at Video Warehouse, One, I'll call it?
>
> Did it occur to you at any point along the way?
>
> A. Well, yes, at some point it did occur to me, yes.
>
> Q. What was your understanding at that time as to what you were required to do in terms of sealing?
>
> A. My understanding was that when the investigation was completed that you immediately sealed whatever tapes had been obtained.
>
> Q. From what did you get that understanding?

A. Well, when I began working on the investigation I studied the statute and several of the annotations. I spoke with more experienced attorneys in the office on wiretaps and it was, it was my understanding, which appeared to be consistent throughout the office. A. 55-56

* * * *

Q. Did you speak to Mr. Fettweis during May or June regarding what your sealing obligations were?

A. I had a conversation with someone. Frankly I don't recall who it was. It may have been Mr. Fettweis because I had asked him questions throughout the investigation. I did speak with someone concerning the issue of sealing when the agent raised it. I don't recall who it was. A. 88.

* * * *

Q. You testified that your understanding of the sealing requirement was based on part on the statute itself; is that correct?

A. Yes.

Q. I would like to show you defendant's exhibit A in evidence?

MR. WHITE: If I may approach the witness?

THE COURT: Yes.

By Mr. White:

Q. And ask you to look at — do you know what defendant's exhibit A is?

A. It's a portion of the statute 2518. It may be the entire statute.

Q. Yes, it is the entire statute. A. 89.

* * * *

Q. Have you looked at the statute — would you agree with me that it does not support your understanding that in 1985, that tapes didn't have to be sealed until the end of an entire interception where

there had been change of premises and the second series of interceptions was not an extension?

A. I think the answer is, no, I would not agree with you. The statute was the same then and it was my understanding and I truly felt that it was the interpretation of other assistants that this statute meant the end of the investigation and that is what I understood to be the case.

Q. Did you rely on the interpretation of other assistants for that conclusion?

A. I felt that my beliefs were consistent with those, those who I went to who had conducted wiretaps, yes.

Q. You relied on, for your conclusion, on what their perception of the statute was?

A. Not completely, but it but, in part, yes.

Q. You also relied on your own reading of the statute?

A. Yes and the annotations at the time. I don't recall exactly. A. 90-91.

* * * *

Q. I believe your testimony was that Agent Mahoney notified you that the tape custodian at the F.B.I. had noticed the change in the numbers and brought that to his attention?

A. Yes.

Q. You consulted with some people about what you should do?

A. Yes.

Q. After the consultation, it was indicated to you you should seal those tapes?

A. That it would probably be better to seal them.

Q. Did anyone — how many people did you consult with, do you have any idea?

A. No, I don't recall exactly.

Q. Did anybody indicate to you you better get those sealed?

A. No. A. 99.

The district court concluded that Armenakis "acted reasonably under the circumstances." While "reading and outlining the statute and reviewing the relevant annotations" could not be "considered a normally competent level of research that a reasonably prudent attorney would undertake," the district court believed the "critical aspect in this case [was] the interaction between Armenakis' own research and the authoritative confirming advice she received from other, more experienced United States Attorneys in her office." Appendix pp. 10-11.

I would conclude that the record will not support the district court's conclusions that Armenakis acted reasonably under the circumstances and, accordingly, that the government's explanation is not "satisfactory" as that term has been interpreted by this court and the Supreme Court in *Ojeda Rios*. To hold that this record suffices to carry the government's burden under *Ojeda Rios* would effectively eliminate that burden and would ill serve the privacy concerns underlying the sealing requirement of the statute.

The district court properly considered the extent of Armenakis' personal investigation into the law. The degree of effort she put into that investigation is one factor to be considered in determining whether she behaved reasonably. On the other hand, her efforts have to be evaluated in light of the fact that the text of "the statute unambiguously rules out" the conclusion she reached, as we noted in *Vastola II*, 915 F.2d at 874. For this reason, I agree with the district court that Armenakis' personal investigation of the legal issue involved will not support a finding of reasonableness.

This leaves Armenakis' testimony that she consulted others in the office whose identity she cannot now recall, at times she cannot now recall, and under circumstances that she cannot now recall. While I do not fault Armenakis for being unable to recall in December of 1990 what she did in the spring of 1985, the indefiniteness of her testimony precludes anyone from determining anything about the

circumstances under which she relied upon the advice of others. One can tell nothing, for example, about what she told her allegedly more experienced peers as a factual predicate for the solicited opinion, whether she inquired over lunch or in a more structured context, whether the opinions provided by the peers were tendered immediately off the top of their heads or after reasoned analysis, and whether or not Armenakis inquired concerning the basis for their proffered views. The government's evidence simply does not permit the kind of inquiry we insisted upon in *Carson*. As a result, we do not know whether this is a case involving "a reasoned oral opinion of a . . . peer with more experience," or a mere "casual conversation." *Carson*, 969 F.2d at 1495.

In order for the government's explanation to be "satisfactory" in a situation like this, a determination that the advice received by the decision maker from others was reasonably relied upon requires far more specific support than the government supplied here. Accordingly, I would hold that the government did not carry its burden of demonstrating that Armenakis acted reasonably under all of the circumstances.

The government has argued throughout the extended history of this case that the admission of the 185 reels of West Long Branch surveillance, if error, was harmless error. It renews that contention before us and suggests that we should determine that issue without further help from the trial judge. This suggestion has some appeal because the parties would understandably like to bring this case to a close. I would decline, however, to accept this invitation. As we noted in *Vastola II*, "if the tapes should have been suppressed, the extent of the damage to the government's case could not easily be assessed." 915 F.2d at 877. The trial judge, who heard the very extensive evidence against Mr. Vastola, is in a far better position than we to assess that damage, and I would solicit his help in doing so.

I would remand with instructions to decide the harmless error issue and to grant a new trial if that issue is determined in Mr. Vastola's favor.

APPENDIX II

Filed February 18, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5727

UNITED STATES OF AMERICA

V.

GAETANO VASTOLA,

Appellant

No. 91-5771

UNITED STATES OF AMERICA

V.

ELIAS SAKA, a/k/a "Lew,"

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF NEW JERSEY
(D.C. Criminal Action Nos. 86-00301 and
86-00301-06)

Argued October 27, 1992

Before: BECKER, NYGAARD and
HIGGINBOTHAM, *Circuit Judges*

(Opinion Filed February 18, 1993)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

This appeal concerns the government's obligation to seal recordings from electronic surveillance and the consequences from failing to seal under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), as amended, 18 U.S.C. § 2510 et seq. After we affirmed the judgments of conviction against Gaetano Vastola and Elias Saka for various

racketeering and extortion charges, the Supreme Court vacated our judgment and remanded for further proceedings consistent with *United States v. Ojeda Rios*, 495 U.S. 257, 110 S.Ct. 1845 (1990), which construed that section of the Wiretap Act at issue here. On remand, the judgments of conviction were ultimately reinstated and Vastola and Saka appeal once more. We must determine whether under *Ojeda Rios* the district court erred when it refused to suppress evidence adduced from certain electronic surveillance tapes.

The other matter before us is the sufficiency of the evidence that convicted Vastola under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c). Vastola was charged with and convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, which requires a finding of two or more predicate racketeering acts. Of the four charged predicate acts, which were the basis for separate charges, the jury convicted him of only one. We will examine whether a conviction under substantive RICO may stand notwithstanding an acquittal on separately charged offenses constituting three of the four predicate racketeering acts charged in the indictment. We will dismiss Saka's appeal because we lack appellate jurisdiction. We will vacate Vastola's judgment of conviction and remand for further consideration consistent with this opinion.

I.

Before we reach the merits of the arguments, we first confront a jurisdictional issue. On August 16, 1991, upon a remand from this court's decision in *United States v. Vastola*, 915 F.2d 865 (3d Cir.

1990) (*Vastola II*), the district court entered the order Saka appeals from. On September 23, 1991, Saka filed a notice of appeal with an accompanying motion to extend the time for filing a notice of appeal under Fed. R. App. P. 4(b). This notice was untimely because Saka failed to file it within 10 days. The district court denied both Saka's motion to extend time and a subsequent motion to reconsider. Saka appealed from the order denying the motion to extend, but sought a voluntary dismissal of that appeal. The appeal was dismissed.

Saka concedes that he has not filed a timely notice of appeal, but contends that we retained jurisdiction when we remanded to the district court. So, he contends that a notice of appeal was unnecessary. This is incorrect. After the district court entered the order appealed from, Saka needed to notify this court and the government that he was appealing. We have no power to waive or extend the time for filing the notice of appeal. See Fed. R. App. P. 26(b). The timely filing of a notice of appeal is both jurisdictional and mandatory. *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 264 (1978). Hence, we lack appellate jurisdiction over Saka's appeal and will dismiss it.

II.

The facts and procedure in Vastola's appeal are quite complex, but we will recite them only insofar as necessary to decide the appeal. For a complete recitation see *United States v. Vastola*, 670 F.Supp. 1244 (D.N.J. 1987); *United States v. Vastola*, 899 F.2d 211 (3d Cir. 1990) (*Vastola I*).

Vastola was indicted along with 20 others in a 114 count indictment charging them with violating RICO and committing various related offenses including mail and wire fraud and extortion. The broad investigative effort included electronic surveillance authorized under the Wiretap Act. That statute regulates the interception and use of electronic, wire and oral communications. Congress intended the Wiretap Act to ensure that evidence obtained from electronic surveillance will not be altered, edited, or otherwise tampered with. Integral to this goal is the sealing requirement.

The Wiretap Act provides: "Immediately upon the expiration of the period of the order [authorizing wiretap], or *extensions* thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions." 18 U.S.C. § 2518(8)(a) (emphasis added). We have construed "immediately" to mean as soon as administratively practical. To qualify as an "extension" of a prior order, the order must, among other things, authorize surveillance on the same subject, at the same location, and regarding the same matters as the original order. Thus, tapes must be sealed as soon as practical after an order expires unless the surveillance of the same premises is continuing under an extension, or the tapes will be suppressed.

This case arose because the government failed to seal the tapes promptly. On March 15, 1985, the district court authorized the interception of oral and wire communications at the Video Warehouse in West Long Branch, New Jersey, the headquarters of the racketeering enterprise. Surveillance there stopped on May 31, when the business was moved from West Long Branch to

Neptune City, New Jersey; but the extension order did not expire until June 13. The government did not immediately present the tapes for sealing as required by the Wiretap Act. Instead, on June 26, the district court authorized surveillance of the Neptune City premises. This was a new order and did not extend the West Long Branch order. On July 15, while the Neptune City surveillance was continuing, the government sealed 183 tapes from the West Long Branch surveillance. These tapes were not timely sealed; they should have been sealed either immediately after the actual surveillance (May 31), or after the final extension order expired (June 13). *Vastola II*, 915 F.2d at 875 & n.16. Citing this sealing delay, Vastola made a pretrial motion to suppress the tapes.

The Wiretap Act does not categorically suppress all untimely sealed tapes, providing instead: "The presence of the seal . . . or a *satisfactory explanation* for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral or electronic communication or evidence derived therefrom." 18 U.S.C. § 2518(8)(a) (emphasis added). When the motion to suppress was decided, the law of this circuit, under *United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974), permitted the government to avoid suppression if it showed that the physical integrity of the tapes had not been compromised.

The government did not explain the sealing delay, but instead relied upon *Falcone* to show that the tapes had not been altered. Also relying on *Falcone*, the district court denied the motion to suppress. The jury convicted Vastola on, among other charges, Counts 1, 3, 4 and 9. (We will

discuss these counts in greater detail when we discuss the sufficiency issue.)

With respect to the suppression issue, in *Vastola I* we too relied on *Falcone* and summarily affirmed the district court's decision not to suppress the tapes. 899 F.2d at 239 n.33. Vastola then successfully petitioned the Supreme Court, *Vastola v. United States*, – U.S. –, 110 S.Ct. 3233 (1990), which granted certiorari, vacated our decision and remanded for consideration in light of *United States v. Ojeda Rios*, 495 U.S. 257, 110 S.Ct. 1845 (1990).

In *Ojeda Rios* there was a delay in sealing tapes with facts similar to those here. On April 27, 1984, the government obtained an order authorizing the interception of communications at Ojeda Rios' residence in Levittown, Puerto Rico. On July 9, surveillance stopped because he moved his residence to El Cortijo, Puerto Rico. An extension order, however, was effective until July 23. On July 27, the government obtained a new order to conduct surveillance at the El Cortijo residence. That order, after several extensions, expired on September 24. After an additional surveillance order covering Ojeda Rios' car expired on October 10, the government sealed the tapes obtained from the surveillance of Ojeda Rios' Levittown and El Cortijo residences.

The government contended that it could satisfactorily explain the sealing delay and demonstrate that the integrity of the tapes had not been compromised. The Court rejected this argument, holding that the government must explain not only why a delay occurred but also why it is excusable. *Id.* at 1850. In so doing, it

expressly overruled the law of this circuit under *Falcone*. *Id.* at 1850 n.5.

To explain the delay, the government represented that the attorney supervising the surveillance believed he was not required to seal the tapes until the end of the investigation. It relied on two Second Circuit cases. See *United States v. Principie*, 531 F.2d 1132 (2d Cir. 1976); *United States v. Scafidi*, 564 F.2d 633 (2d Cir. 1977). The government thus argued that the delays were excusable because they resulted from a good faith, reasonable misconstruction of the statutory term "extension."

After examining the Second Circuit cases, the Court concluded that "the cases do support the conclusion that the 'extension' theory now pressed upon us was objectively reasonable at the time of the delays." *Ojeda Rios*, 110 S.Ct. at 1851. It held that the excuse was reasonable because the government need not prove that its understanding of the law was correct, but that its interpretation was reasonable at the time. *Id.* Nonetheless, the Court stressed that an excuse is not satisfactory unless it was relied on to explain the sealing delay. *Id.* Justices O'Connor and Blackmun concurred separately to emphasize this point; they joined the majority with the understanding that the excuse, albeit reasonable, "must also reflect the actual reason for the delay." *Id.* at 1851-52.

In *Vastola II* we considered this case in light of *Ojeda Rios*. The government advanced several arguments why the tapes should not be suppressed. It first contended that there was no sealing delay at all because the order authorizing surveillance at the Neptune City business extended the original authorization for the West Long

Branch surveillance. The practical import of this argument is that the obligation to seal the West Long Branch tapes did not arise until the end of the Neptune City surveillance. We rejected this view as "the statute unambiguously rules out this possibility." 915 F.2d at 874. Thus, the tapes obtained from the West Long Branch premises should have been sealed either after the actual surveillance of those premises or after the expiration of the final extension order. *Id.* at 875 & n.16.

The government then tried to furnish a satisfactory explanation for the delay by arguing that even if the Neptune City order was not an extension of the West Long Branch order, the supervising attorneys reasonably believed based on a reading of the extant law that the sealing obligation arose at the conclusion of the entire investigation. In the alternative, the government argued that we should remand to the district court for further proceedings to determine the actual reasons for the sealing delay.

We rejected the suggestion that the government satisfactorily explained the delay. The record was insufficient to show that the proffered explanation was the actual reason for the delay. While it was possible that the government offered no explanation for the delay because it had none, it was equally possible that the government assumed that *Falcone* required it to demonstrate only the integrity of the tapes to defeat suppression. We thus concluded that the district court in the first instance should decide whether the government should be permitted to offer an explanation, and if so, to determine whether the explanation is satisfactory. *Id.* at 876. We analogized the first

inquiry to that involved in reopening a case. As guidance for the district court we cited *United States v. Blankenship*, 775 F.2d 735, 740-41 (6th Cir. 1985). We emphasized that the government must prove the *actual reason* for the sealing delay rather than an *excuse* for some ulterior purpose or administrative bungle.

After first considering the *Blankenship* factors on remand, the district court allowed the government an opportunity to present evidence showing the reasons for the delay. *United States v. Vastola*, 772 F.Supp. 1472, 1477-78 (D.N.J. 1991). The court found that the actual reason for the sealing delay was that the government attorneys in charge of the surveillance believed that sealing was not required until after the entire investigation. *Id.* at 1481. It then concluded that the explanation for the sealing delay was objectively reasonable, noting that the *Ojeda Rios* Court found a similar explanation reasonable. *Id.* at 1482-83. It therefore reinstated Vastola's conviction and sentenced him. Vastola appeals again, contending that the district court erred by refusing to suppress the tapes and that the evidence is insufficient to convict him on Count 1.

III.

We consider as a threshold matter whether the district court on remand abused its discretion by allowing the government to proffer a post-conviction explanation for the sealing delay. See *Vastola II*, 915 F.2d at 876; *United States v. Carson*, 969 F.2d 1480, 1487 (3d Cir. 1992). We must then consider whether the explanation proffered is satisfactory under the Wiretap Act. We review the district court's factual findings for clear

error. *United States v. McMillen*, 917 F.2d 773, 774 (3d Cir. 1990). We exercise plenary review over its legal conclusion that the explanation was objectively reasonable. *Carson*, 969 F.2d at 1487.

A.

The district court permitted the government on remand to explain the sealing delay. Vastola first contends that the court had no authority to allow the government to proffer a post-conviction explanation. He points to section 2818(8)(a), which provides: "The presence of the seal provided for by this section, or a satisfactory explanation for the absence thereof, shall be a *prerequisite* for the use or disclosure of the contents of any [wiretap evidence]." (Emphasis added.) The statute's plain language, the argument goes, requires the government to proffer a satisfactory explanation before the tapes are admitted into evidence and not after they have been used to obtain a conviction. Whatever merit this argument may have had, our case law clearly holds that the district court has the discretion to allow the government to offer a post-conviction explanation where no explanation had been given before. *Carson*, 969 F.2d at 1493; *Vastola II*, 915 F.2d at 875.

Second, Vastola contends that *Ojeda Rios* precludes the district court from permitting the government to offer a post-conviction explanation for the sealing delay. We acknowledge, as we did in *Vastola II*, that the circumstances here differ from *Ojeda Rios*. The government there offered a reason for the delay *before* the evidence was admitted (though a question remained as to whether the proffered explanation at trial was the

same one determined to be reasonable on appeal). The government here offered no explanation, choosing instead to rely on *Falcone*.

We distinguished *Ojeda Rios* on the basis that it arose under Second Circuit law, which required the government to satisfactorily explain the sealing delay at trial. See *United States v. Gigante*, 538 F.2d 502, 505 (2d Cir. 1976). Third Circuit law, however, required only that the government show that the tapes had not been altered. The significance of this is that the district court might "conclude that it would not fairly characterize any reliance the government may have placed on *Falcone* as unreasonable." *Vastola II*, 915 F.2d at 875-76.

Last, Vastola contends that the district court abused its discretion because *Falcone* did not eliminate the need to explain sealing delays. He further contends that since the government chose to rely on *Falcone* at trial, it is judicially estopped from asserting another explanation. Neither argument has merit. We held in *Falcone* that "where the trial court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom." 505 F.2d at 484. Since we upheld the district court's original decision not to suppress the tapes based on a demonstration of their integrity, *Vastola I*, 899 F.2d at 239 n.33, the government correctly construed *Falcone* to eliminate the need to explain.

Moreover, the government could have "assumed that it could defeat the suppression motion by demonstrating the integrity of the tapes and thus did not find it necessary to introduce evidence on this point." *Vastola II*, 915 F.2d at 876. The

judicial estoppel doctrine seeks to prevent a party from playing fast and loose with courts by asserting contradictory positions; it does not preclude a party from later asserting a position it could have pressed but did not because our case law provided that party with a better argument. Cf. *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).

Where the government offers a different reason for a delay than it did at the original suppression hearing, without some reasonable explanation for the shifting position the district court abuses its discretion if it considers the second explanation. *Carson*, 969 F.2d at 1496-97. That is not the case here, however. The government offered no explanation at the suppression hearing, choosing instead to rely, understandably, on *Falcone*. We directed the district court to consider the issue with respect to the factors enunciated in *Blankenship*. *Vastola II*, 915 F.2d at 876. The critical inquiry then focuses on the prejudice to the opposing party. See *Blankenship*, 775 F.2d at 741.

Vastola contends that he has been prejudiced because the passage of time and the concomitant fading of memories will not only present the risk of obscuring the true reason for the delay but also give the government an opportunity to temper its explanations according to the dictates of *Ojeda Rios* and *Vastola II*. Be that as it may, any prejudice caused by elapsed time is suffered by the government for it bears the burden of showing the actual reason for the delay. The risk associated with elapsed time is no reason to conclude that the district court abused its discretion. The government, rather than Vastola, must explain to

the court's satisfaction that its proffered reason was the actual reason for the delay. *Vastola II*, 915 F.2d at 876.

The district court relied on *United States v. Gallagher*, 751 F.Supp. 481 (D.N.J. 1990), which considered this issue under similar circumstances. The court noted that the *Gallagher* court concluded that the proffer of a belated explanation would not prejudice the defendants' case. *Vastola*, 772 F.Supp. at 1477. It opined that to prohibit the government from giving an explanation would be grossly unfair as *Falcone* did not require it. *Id.*

Although we vacated and remanded *Gallagher* in *Carson*, 969 F.2d at 1501, we did so because the district court did not properly analyze the legal sufficiency of the explanation, not because it allowed the government to give a belated explanation. The district court here was within its discretion to rely on *Gallagher* and has sufficiently explained why it permitted the government to proffer an explanation. We hold that the district court did not abuse its discretion by allowing the government to do so.

B.

We next consider whether the explanation given was satisfactory under the Wiretap Act and *Ojeda Rios*. This inquiry is two-pronged: first, whether the proffered explanation was the actual reason for the delay; second, whether it is objectively reasonable. The Assistant United States Attorney primarily responsible for the surveillance, Diana Armenakis, testified at the evidentiary hearing. The gist of her testimony was that she believed that the Wiretap Act required sealing only after the entire investigation. The district court credited her

testimony. *Vastola*, 772 F.Supp. at 1481. Vastola concedes on appeal that the district court's finding as to the actual reason for the delay is not clearly erroneous. So we need not belabor this point.

The heart of this matter is whether the government's explanation is objectively reasonable. Vastola contends that the test of an explanation's legal sufficiency should be whether a government attorney exercising a degree of care could have reasonably arrived at the misunderstanding: that is, the "inquiry into the circumstances surrounding a person's *conduct* goes directly to the objective reasonableness of that conduct." Reply Br. 9 (emphasis in original). Vastola contends that the government attorneys failed to exercise this degree of care. The government, however, contends that an attorney's conduct is irrelevant. Rather, the *explanation*, it emphasizes, must be reasonable. So, if a reasonable attorney could have formed the same legal conclusion, it argues that the explanation is reasonable and therefore the delay is excusable.

While this appeal was pending, we decided *United States v. Carson*, 969 F.2d 1480 (3d Cir. 1992), which addressed similar issues also in light of *Ojeda Rios*. In *Carson* several orders authorizing surveillance expired before the government obtained orders purporting to extend them. This resulted in some gaps between the expiration date of one order and the entry of a new order. Since the statute requires tapes be sealed "immediately upon the expiration of the period of the order, or *extensions thereof*," we considered whether an order to extend surveillance needs to be entered before the prior order expires to qualify as an "extension." We held that a new order is an

extension if it was "obtained as soon as administratively practical or any delay is satisfactorily explained, *i.e.*, is shown to have occurred without fault or bad faith on the part of the government." *Id.* at 1488. Applying this test, several sets of tapes were untimely sealed. Only two sets are pertinent here, the "205 Zax tapes" and the "33 Zax tapes."

As to the 205 Zax tapes, we concluded that an order dated December 21 was not an extension of one that expired December 3. These tapes should have been sealed as soon as practical after December 3, but were not sealed until December 18. We held that this fourteen day delay was too long to say that the tapes were "immediately" sealed.

The government explained at the evidentiary hearing that the supervising attorney, Robert Stewart, erroneously believed that a time gap of up to thirty days between the expiration of an order and the entry of the new order did not preclude the latter from being an extension. Although Stewart believed a thirty-day gap was permissible, he sealed the 205 Zax tapes on December 18 as a precautionary measure. The district court credited the truth of his explanation and concluded that it was reasonable. *Gallagher*, 751 F.Supp. at 494.

After considering the explanation in light of *Ojeda Rios*, we held that the district court did not err by refusing to suppress these tapes. Stewart read the statute and the extant case law. Since the Wiretap Act limits the life of an order to thirty days, Stewart chose thirty days as the outer limit for a gap. He started the sealing procedure shortly after ten days had expired and secured the

extension well within his thirty day benchmark. "He was mistaken, but *Ojeda Rios* makes it clear that pre-*Ojeda Rios* mistakes of law regarding when sealing is required will not be grounds for suppression." *Carson*, 969 F.2d at 1493. Thus, the tapes were properly admitted.

As to the 33 Zax tapes, we observed that the district court assumed that an order dated March 9 was not an extension of one that expired February 27 (a ten-day delay). *Id.* at 1493. See *Gallagher*, 751 F.Supp. at 494. We remanded to the district court to determine in the first instance the threshold issue of whether the government sealed the tapes as soon as practical, for if it did "their admission will have been proper." 969 F.2d at 1496. In the event that the district court were to find a delay, however, we gave some words of guidance as to the reasonableness of the government's explanation.

The government explained at the evidentiary hearing that Warren Robins, who had assumed the sealing responsibilities from Stewart as to these 33 Zax tapes, had discussed the sealing issue with Stewart. In their conversation, Stewart meant to convey that sealing was required at the end of a particular order or its extension, but Robins understood him to mean that sealing was required only at the conclusion of the entire investigation, rather than at the end of interception at a particular location. "The district court noted that the Supreme Court had accepted a similar rationale in *Ojeda Rios*, subject only to determine on remand that the reason the government advanced in *Ojeda Rios* at the appellate level was not a new justification." *Id.* at 1494. Accordingly,

it held that the explanation was reasonable. *Gallagher*, 751 F.Supp. at 495.

We agreed with the district court that a reasonable mistake of law can be a satisfactory explanation for a delay, but opined that its findings failed to support its conclusion. We held: "The government does not, and cannot, argue that an objective reading of the extant case law might have caused an objectively reasonable attorney to take Robins' view" that sealing was required only after the investigation had concluded. 969 F.2d at 1494.

It was suggested at oral argument that this holding is at odds with *Ojeda Rios*. The government there explained that the attorney supervising the surveillance believed he was not required to seal the tapes until the end of the investigation or a meaningful hiatus. The Supreme Court held that this belief, albeit mistaken, was reasonable and cited *United States v. Principie*, 531 F.2d 1132 (2d Cir. 1976). In *Principie*, similar to the case here, electronic surveillance was ordered at different premises, and at least sixteen days after a prior order expired. The Court of Appeals for the Second Circuit held that that order was an extension within the meaning of section 2518 because it "was clearly part of the same investigation of the same individuals conducting the same criminal enterprise." *Id.* at 1142 & n.14. The Supreme Court held that *Principie* supported the government's conclusion that sealing was not required until after the investigation or a meaningful hiatus. *Ojeda Rios*, 110 S.Ct. at 1851.

Although *Ojeda Rios* and *Principie* suggest that the explanations proffered in *Carson* and here are reasonable, we are not free to conduct an

unbridled analysis. While Assistant United States Attorney Armenakis studied the statute, outlined it, read its annotations, and spoke with more experienced attorneys, *Vastola*, 772 F.Supp. at 1480, she did form the same mistaken belief held by Attorney Robins in *Carson* (who did none of these things and instead relied on the casual conversation with a superior). She believed that sealing was required only after the investigation, and *Carson* held that this explanation was not objectively reasonable. We are forced to conclude the same. This notwithstanding, *Carson* also held that an unreasonable mistake of law does not automatically lead to suppression.

The *Carson* court explained that even though an attorney's mistake of law is unreasonable, the government can still show a satisfactory explanation if "the attorney involved acted as a 'reasonably prudent' attorney would to investigate the legal question involved in a reasonably prudent manner." 969 F.2d at 1494. Under the circumstances in *Carson*, if a prudent lawyer reasonably relied on what Robins perceived to be Stewart's advice without any independent investigation of the law, Robins' explanation as to the delay "would be an objectively reasonable mistake of law that satisfactorily explains the government's failure to meet the statute's requirement of immediate sealing." *Id.* The case then stands for this proposition: When a government attorney's legal conclusion is found to be unreasonable, the explanation for the delay would still be an objectively reasonable "mistake of law" if the government can show that its attorney has adequately researched the law or has otherwise acted reasonably.

Since the district court did not determine whether Armenakis conducted herself reasonably under the circumstances, we must remand for further proceedings, which may include a scrutiny for harmless error.[1]

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1. Judge Nygaard believes that *Carson* was wrongly decided for two reasons. First, the proffered explanation in *Carson* was objectively reasonable. *Ojeda Rios*, 110 S.Ct. at 1851; *Principie*, 531 F.2d at 1142. Second, when the *Carson* court remanded to consider Robins' conduct after concluding that his view of the law was unreasonable, it essentially gave the government a second bite at the apple. While an attorney's conduct may be relevant in some circumstances, it is irrelevant under *Ojeda Rios* when the delay is attributable to a mistaken belief about the extant law.

When there has been a misunderstanding of the law, *Ojeda Rios* makes clear that the government's "*interpretation* [of the law] was objectively reasonable at the time." 110 S.Ct. at 1845 (emphasis added). In other words, the *explanation* must be satisfactory under the Wiretap Act. After we are satisfied that the actual reason for the delay was the mistaken view of the law, nothing in the Wiretap Act or *Ojeda Rios* requires that we inquire into the attorney's conduct. It matters not whether the mistaken belief was formed after conducting an independent, exhaustive research on the law of wiretapping or after being told by another attorney in a casual conversation.

This does not mean that there are no situations where we should inquire into the government's conduct. When there are delays in sealing, they can be attributed to three general reasons: first, the government acted in bad faith or sought a tactical advantage; second, it misconstrued the law; third, administrative necessity, mistake, obstacle or other unexpected circumstances arose. The first explanation is, of course, inexcusable. "A satisfactory explanation is usually based on a mistaken view of the law on what triggers sealing, but on occasion it can be supplied by an extraneous unforeseen emergent situation." *Carson*, 969 F.2d at 1487

IV.

Vastola was ultimately convicted on four counts of a redacted superseding indictment: Count 1, conducting the affairs of an enterprise through a pattern of racketeering activity violating the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1962(c); Count 3, conspiracy

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(citations omitted). The second explanation, a mistake of law, is what *Ojeda Rios* addressed. The inquiry in such cases should be governed by *Ojeda Rios*.

Where there has been a delay due to administrative necessity, mistake, obstacle or other unexpected circumstances, the inquiry focuses on the surrounding circumstances as they determine whether the explanation was reasonable and therefore excusable. See *United States v. Mora*, 821 F.2d 860 (1st Cir. 1987). This would entail a scrutiny of the attorney's conduct. So, for example, the government has a satisfactory explanation if the delay was attributable to a lack or diversion of resources, the caseload, or an attorney's health problems. See *United States v. Massino*, 784 F.2d 153 (2d Cir. 1986); *United States v. McGrath*, 622 F.2d 36 (2d Cir. 1980).

The district court has already determined that the government's explanation was the actual reason for the delay. It found that Armenakis consulted the statute, its annotations and her colleagues and that based upon this research she concluded that the Wiretap Act required sealing only after the entire investigation. If we are satisfied that she actually believed this, we should not consider how much she looked at the law, but should consider instead whether a reasonable attorney could have construed the law as she did. We should have stopped here in *Carson* (in which case *Carson* would still have been wrongly decided since under *Ojeda Rios* and *Principie* the mistake of law was reasonable). Instead, however, the *Carson* court proceeded further to inquire into the attorney's conduct.

to conduct a RICO enterprise in violation of 18 U.S.C. § 1962(d); Count 4, conspiracy to collect an extension of credit by extortionate means in violation of 18 U.S.C. § 894; and Count 9, conspiracy to affect commerce by extortion in violation of the Hobbs Act, 18 U.S.C. § 1951.

A conviction under Count 1 requires, among other things, finding a "pattern of racketeering activity," which RICO defines as "at least two acts of racketeering activity." 18 U.S.C. § 1961(5). See *Vastola I*, 899 F.2d at 222 & n.13. The indictment listed these four racketeering acts (each of which comprised of one or more of the offenses charged in the non-RICO counts):

> 1. Predicate Act One (the "MCA extortion conspiracy") constitutes Counts 4, 5, 9, 10 – use and conspiracy to use extortionate means to collect extension of credit;
>
> 2. Predicate Act Two constitutes Counts 6 and 7 – conspiracy to make extortionate loans and to use extortionate means to collect loans;
>
> 3. Predicate Act Three constitutes Count 11 – making an extortionate loan to Daniel Zack;

We dealt with a special situation in *Carson*, one not likely to arise frequently. The circumstances here fit squarely into what the *Carson* court identified as "usually" arising under: Armenakis made a mistake of law. In this case, the inquiry should be simply whether Armenakis' "*interpretation* [of the law] was objectively reasonable at the time." *Ojeda Rios*, 110 S.Ct. at 1845 (emphasis added). Since the *Carson* court says that her explanation is unreasonable, and since I reluctantly agree that the court requires a two-step inquiry first into the reasonableness of the explanation and then into the conduct, we must remand for findings as to the latter.

4. Predicate Act Four constitutes Counts 24 and 26 – fraudulent concealment and transfer of property of Dispodype, Inc., in violation of bankruptcy laws.

As noted, Vastola was convicted on Counts 4 and 9 of the MCA extortion conspiracy, the first racketeering act. Of the counts supporting the three remaining racketeering acts, the jury was either deadlocked or acquitted Vastola of all offenses underlying the remaining three racketeering acts (deadlock on Counts 6 and 11 and acquittal on Counts 7, 24 and 26). Further, no special verdict regarding the racketeering acts was obtained for Count 1. Thus, the jury's verdict did not facially support a second racketeering act.

When a jury delivers an inconsistent verdict in a compound offense, there are two independent questions: whether the inconsistent verdict mandates an acquittal; and whether the evidence is sufficient to support a conviction for the compound offense.

Vastola moved the district court to set aside the jury's guilty verdict on Count 1 because the jury's verdict was inconsistent and showed that the jury could not possibly have found that he committed the requisite two or more racketeering acts. The court agreed and entered a judgment of acquittal. The government appealed this decision.

In *Vastola I* we affirmed Vastola's convictions for the most part, but reversed the order setting aside the verdict on Count 1. We acknowledged that there was no question that the verdict was inconsistent. Where, however, the problem is one of inconsistent verdicts, we noted that *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471

(1984), governs. That case held that jury verdicts cannot be set aside solely on the ground of inconsistency. As the *Powell* Court explained, "Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper – the one that the jury 'really meant.'" 105 S.Ct. at 478. As in *Powell*, we noted that the jury's verdict could mean that the jury believed that Vastola did not commit the RICO offense, or it could mean that the jury really did find a RICO violation yet acquitted him of the predicate offenses out of lenity or some improper motivation. 899 F.2d at 225.

We held that the jury's verdict of guilty on Count 1 presupposes that it found the requisite two racketeering acts regardless of whether that presupposition is inconsistent with its verdict on other counts. *Id.* at 222-25. We remanded for entry of judgment of conviction on Count 1 and for resentencing, noting that Vastola is free to appeal from the reinstatement of judgment and sentence, except for issues already decided against him. *Id.* at 225. Since the sole basis for the district court's judgment of acquittal was the inconsistent verdicts, we expressed no opinion as to whether the evidence of Vastola's participation in the racketeering acts was sufficient. Vastola now appeals his conviction on Count 1 on that ground.

Vastola contends that, aside from the MCA extortion conspiracy constituting one predicate act, we cannot determine which other racketeering act the jury relied on to reach its verdict. And since we cannot determine this, he further contends that

we must find sufficient evidence to prove all three of the other acts.

In *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), a jury convicted the defendant of four substantive offenses and a RICO conspiracy offense whose racketeering acts constituted the four substantive offenses. We then overturned two of convictions for the substantive offenses. Since we had no way of knowing which of the two racketeering acts the jury relied on to convict the defendant on the conspiracy charge, we overturned that charge as well, regardless of the possibility that the jury could have reached its verdict based on a guilty finding on two of the valid predicate offenses. *Id.* at 670. We specifically relied on these two cases to support our conclusion: *United States v. Dansker*, 537 F.2d 40, 51-52 (3d Cir. 1976); *United States v. Tarnopol*, 561 F.2d 466, 474-75 (3d Cir. 1977).

In *United States v. Riccobene*, 709 F.2d 214 (3d Cir. 1983), we construed *Brown* as standing for the proposition that "if a defendant is charged with multiple predicate offenses, the evidence must be sufficient to prove all of them if the court cannot determine which specific offenses the jury relied upon in reaching its verdict." *Id.* at 227. We, however, did not construe *Brown* to require a reversal of a defendant's conviction when there is sufficient evidence from which the jury could have concluded that he did commit every predicate offense charged against him. *Id.* at 228. Nor did we construe it to require a reversal when we can determine that the jury did not rely on the challenged predicate offense in reaching its verdict on the RICO charge. *Id.*

Because the *Riccobene* jury returned an acquittal on one of the offenses constituting a predicate offense, that verdict was a functional equivalent of a special interrogatory. The *Riccobene* court reasoned that in *Brown* the guilty verdicts on all the substantive charges indicated that the jury might have relied on those charges as predicate offenses when considering the RICO claim, whereas in *Riccobene* there was no reason to believe that the jury returned inconsistent verdicts by relying on the charge underlying the acquittal as a basis for the RICO verdict. *Id.* at 229-30. It thus upheld the conspiracy conviction.

Since *Brown* and *Riccobene*, the Supreme Court decided *Griffin v. United States*, – U.S. –, 112 S.Ct. 466 (1991). The defendant there was charged with conspiracy to defraud the Internal Revenue Service and the Drug Enforcement Administration. The government conceded that there was insufficient evidence to defraud the DEA. The trial court instructed the jury in a manner that would allow the jury to return a guilty verdict if it found the defendant guilty of either one of two fraudulent objects. The jury returned a general verdict of guilty on the conspiracy charge. The issue was whether a general guilty verdict on a multiple-object conspiracy charge must be set aside if the evidence is inadequate to support the conviction as to one of the objects.

Citing *Turner v. United States*, 396 U.S. 398, 90 S.Ct. 642 (1970), the Court opined that when a jury returns a general guilty verdict on an indictment charging several acts in the conjunctive, the verdict stands if the evidence is sufficient with respect to any one of the acts charged – even though there is no assurance that

a valid ground, rather than an invalid one, was actually the basis for the jury's action. *Id.* at 469, 473. The Court then distinguished between cases where a basis of conviction was either unconstitutional or otherwise illegal and where a basis of conviction was merely unsupported by sufficient evidence. *Id.* at 470-73. It observed that Griffin "cite[d] no case, and we are aware of none, in which we have set aside a general verdict because one of the possible bases of conviction was neither unconstitutional as in [*Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532 (1931)], nor even illegal as in [*Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064 (1957)], but merely unsupported by sufficient evidence." *Id.* at 472.

Griffin tried to distinguish *Turner* by asserting that the Court had not yet applied *Turner*'s general rule to multiple-act conspiracies. The Court rejected this distinction and agreed with the majority of federal courts that have made no exception to the *Turner* rule for multiple-object and multiple-overt act conspiracies. It noted that only the Third Circuit had adhered to a contrary rule. *Id.* at 473 n.2, citing *United States v. Tarnopol*, 561 F.2d 466, 474-75 (3d Cir. 1977).

In *Tarnopol* a jury returned a general verdict of guilty on a conspiracy charge based upon three objectives. We found on appeal that there was insufficient evidence to support one of these objectives. 561 F.2d at 475. "In this situation, the verdict of guilty . . . cannot stand if the indictment was insufficient in law in that any one of the three objectives of the conspiracy did not constitute a crime or if the evidence was insufficient to sustain a finding by the jury that any one of these activities had been engaged in."

Id. at 474, citing *Dansker*, 537 F.2d at 51. To the extent that *Brown* and *Riccobene* relied on *Tarnopol* and *Dansker*, it is clear that the Supreme Court has expressly overruled those cases. *Griffin*, 112 S.Ct. at 473 n.2.

The only distinction between *Griffin* and this case is the substantive crimes. Whereas Griffin was charged with conspiracy in which the jury could properly convict upon a finding of one of the two objects charged, Vastola was charged with substantive RICO on Count 1 in which the jury could properly convict upon a finding of two of the four predicate acts charged. This distinction, however, is irrelevant. The rationale of *Griffin* directly applies to this case.

Nonetheless, there remains an issue of whether *Griffin* and *Powell* can be applied together. The decisions in *Powell* and *Vastola I* preceded *Griffin*. Vastola argues that the application of both *Powell* and *Griffin* would exponentially expand their underlying presumptions to a level uncontemplated and would force us to speculate on the jury's deliberation. To the contrary, we conclude that what Vastola wants would require that we speculate about the jury's deliberation, whether the jury did or did not find the requisite predicate acts, and that we should not do. See *Powell*, 105 S.Ct. at 477.

Where there has been an inconsistent verdict, the criminal defendant is protected against jury irrationality and error by a review of the sufficiency of the evidence. *Id.* at 478. "Sufficiency-of-the-evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt.

This review should be *independent* of the jury's determination that evidence on another count was insufficient." *Id.* (emphasis added and citations omitted).

An inconsistent verdict could have netted a windfall for the government or for the defendant. Assume for the moment that the jury believed Vastola committed three of the predicate acts but acquitted him on two of the predicate acts out of lenity or mistake. In such a case, there is no good reason why Vastola is entitled to an acquittal on the RICO count as well because the government failed to prove *all* the predicate acts or because the jury improperly acquitted him on two of the predicate acts. In short, we will not reverse a conviction based on speculations about the jury's rational deliberation process. We will instead inquire whether the jury's guilty verdict on Count 1 can be upheld because there is sufficient evidence to support two predicate acts.

The evidence supports Vastola's convictions under Counts 4 and 9 relating to the MCA extortion conspiracy. *Vastola I*, 899 F.2d at 230. He cannot argue the legal sufficiency of these convictions; there is sufficient evidence that Vastola committed one of the four alleged racketeering acts. *Id.* at 225. Our task is to determine whether there is sufficient evidence supporting another racketeering act.

The second predicate act listed in the indictment was a conspiracy to make extortionate loans as charged in Count 6, and a conspiracy to use extortion to collect loans as charged in Count 7. We believe *Vastola I* makes it clear that there is sufficient evidence to convict on Count 7. Although we reversed Vastola's conviction for insufficient

evidence on Count 2 (substantive RICO based on an unlawful debt collection from Joseph Dwek), we noted that "the evidence was overwhelming that Vastola supervised the collection of unlawful debts by his subordinates within the enterprise." *Id.* at 227. Furthermore, in affirming Vastola's conviction under Count 3 (conspiracy to conduct a RICO enterprise), we commented on the evidence linking Vastola to an unlawful extortionate loan to Dwek. We opined that Vastola's own statements tied the Dwek loan to the RICO enterprise. "There is little question that Vastola knew the [Dwek] loan was unlawful and with that knowledge, encouraged Saka and Brocco to collect it." *Id.* at 229.

We conclude that viewing the evidence in light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469 (1942), there is sufficient evidence to support a conviction under Count 7. As there is sufficient evidence that Vastola committed the two requisite racketeering acts, Vastola's conviction under Count 1 must stand unless the district court rules in favor of Vastola on the wiretap issue.

V.

In sum, we hold (1) that we do not have jurisdiction over Saka's appeal, (2) that the district court erred by refusing to suppress tapes without properly inquiring into whether the government has proffered a satisfactory explanation under the Wiretap Act, and (3) that the evidence was sufficient to convict Vastola of conducting a RICO enterprise in violation of 18 U.S.C. § 1962(c). We will dismiss Saka's appeal. We will vacate Vastola's judgment of conviction and remand with instructions to consider the reasonableness of

Armenakis' inquiry into the law as to the sealing of the 183 tapes obtained from the surveillance of the West Long Branch premises and to consider whether the error, if any, was harmless.

APPENDIX III

Filed October 2, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5372, 89-5383 and 89-5510

UNITED STATES OF AMERICA,

Appellant in No. 89-5510

v.

GAETANO VASTOLA,

Appellant in No. 89-5372

v.

ELIAS SAKA,

Appellant in No. 89-5383

On Appeal from the United States District Court
for the District of New Jersey
Criminal No. S-86-301 and on
Remand from the Supreme Court, No. 89-1575

Submitted Pursuant to Third Circuit Rule 12(6)
August 29, 1990

BEFORE: GREENBERG, SCIRICA, AND SEITZ, *Circuit Judges.*

(Filed October 2, 1990)

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OPINION OF THE COURT

GREENBERG, Circuit Judge.

This case is before us on remand from the Supreme Court following our decision affirming the convictions of appellants Gaetano Vastola and Elias Saka for a RICO conspiracy offense under 18 U.S.C. § 1962(d) and related extortion offenses under 18 U.S.C. § 894. *United States v. Vastola*, 899 F.2d 211 (3d Cir. 1990). In addition, we affirmed Saka's convictions for two substantive RICO offenses under 18 U.S.C. § 1962(c), and for mail, wire, bankruptcy, and insurance fraud, and reversed Vastola's conviction for a substantive RICO offense under 18 U.S.C. § 1962(c) due to insufficiency of the evidence regarding his participation in the collection of an unlawful debt.

Finally, in an appeal brought by the government pursuant to 18 U.S.C. § 3731, we vacated the district court's grant of Vastola's motion for a judgment of acquittal on Count I of the superceding indictment charging him with a substantive RICO violation predicated upon a pattern of racketeering activity and remanded Vastola's case for resentencing.

Inasmuch as the history of this rather complex case is fully set forth in our reported opinion, we will refer the reader to that opinion for the facts of the case and will discuss only the circumstances surrounding the government's electronic surveillance of appellants' activities, as the questions before us on remand relate to the admissibility of certain wiretap evidence derived from that surveillance.

I. Background

Appellants Vastola and Saka originally were indicted along with 19 other defendants in a 114 count indictment charging a variety of crimes. By opinion and order dated September 1, 1987, the district court severed the case for separate trials, *United States v. Vastola*, 670 F. Supp. 1244, 1261 (D.N.J. 1987), resulting in Vastola and Saka ultimately being jointly tried on a 26 count superceding indictment naming Vastola in 14 counts and Saka in 25 counts. As pertinent to this remand, the district court, at the time it ordered the severance, denied a pretrial motion, joined in by all of the original defendants, which sought the suppression of all wiretap evidence derived from the government's electronic surveillance of the Video Warehouse in West Long Branch, New Jersey. 670

F. Supp. at 1282. The evidence obtained from the West Long Branch surveillance was germane in the government's case against Vastola and Saka, as the Video Warehouse was the headquarters of their racketeering enterprise.

The circumstances leading to this motion may be traced to March 15, 1985, when the United States District Court for the District of New Jersey authorized the interception of wire and oral communications at the Video Warehouse in West Long Branch. The parties agree that the authorization was extended on April 16, 1985, and on May 14, 1985, with the second extension expiring on June 13, 1985, and that the interception in fact ceased on May 31, 1985, when the co-conspirators moved their operation to a new location in Neptune City, New Jersey. The surveillance generated approximately 185 reels of tape from March 15, 1988, to May 31, 1985, but the government did not immediately present them for judicial sealing, as required by section 2518 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (hereinafter Wiretap Act).[1] Instead, on June 26, 1985, the

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[1] Section 2518 provides in pertinent part that:

> The contents of any wire, oral or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device . . . Immediately upon the expiration of the period of the [wiretap] order, or extensions thereof, *such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. . . . The presence of the seal . . . or a*

(Continued on following page)

government obtained authorization to engage in electronic surveillance of Video Warehouse at its new location.[2]

On July 15, 1985, while the order of June 26, 1985, was still in force, the government presented the 185 reels of tape from the West Long Branch, New Jersey, surveillance for sealing. App. at 188-89. It was later discovered that two of the 185 tapes sealed on July 15, 1985, were duplicate tapes which, due to a clerical error, had been stored with the original tapes. Accordingly, on August 19, 1986, the originals from which the duplicates had been made were presented for sealing to the district court which, finding that the government had provided a "satisfactory explanation for the delay in presenting [the] two reels for sealing," ordered them sealed. App. at 200.

In their pretrial motion before severance of Vastola's and Saka's case, the defendants argued that 183 of the tapes from the West Long Branch surveillance should be suppressed because of what the defendants perceived to be a 45 day delay in their sealing, and that the remaining

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(Continued from previous page)

> *satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral or electronic communication* or evidence derived therefrom under subsection (3) of section 2517.

18 U.S.C. § 2518(8)(a) (emphasis supplied).

[2] The Neptune City surveillance was terminated on July 25, 1985, and the surveillance tapes were sealed on August 6, 1985. App. at 191-94. The appellants have not raised any arguments with respect to the 12 day delay in the sealing of the Neptune City tapes.

two tapes which had been misplaced due to the clerical error should be suppressed because of an 80 day sealing delay.[3] The 45 days were measured from May 31, 1985, when the interceptions ceased, until July 15, 1985 when the tapes were sealed. The district court rejected this argument on the basis of *Untied States v. Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), *cert. denied*, 420 U.S. 955, 95 S.Ct. 1339 (1975), which held that suppression is an appropriate remedy for a delay in sealing wiretap evidence only if it can be shown that the physical integrity of the tapes has been compromised. 670 F. Supp. at 1282. Because the defendants had not challenge their physical integrity, the district court concluded that suppression of the tapes was not mandated under the Wiretap Act. *Id.*[4] In our previous opinion, we summarily affirmed the district court's decision on this point, stating only the obvious conclusion that it "was fully consistent with *Falcone*." 899 F.2d at 239 n.33.

After severance of their cases, Vastola and Saka, in a pretrial motion, raised the additional contention that all of the wiretap evidence should be suppressed because the government violated the custody requirements of various unsealing orders when it sent the tapes to a private

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[3] As appellants point out in their letter brief to this court, the sealing delay with respect to the final two reels from the West Long Branch surveillance was well over a year, as the original reels were sealed on August 19, 1986, not August 19, 1985. Letter Brief at 3 n.1.

[4] In what appears to be a typographical error, the district court's opinion indicates that the original interception order for the Video Warehouse surveillance was entered on March 25, 1985, rather than March 15, 1985. 670 F. Supp. at 1282.

individual, Paul Ginsberg, for audio enhancement.[5] This issue first surfaced when Vastola and Saka, while preparing for their joint trial, discovered that Ginsberg had unsupervised custody of the tapes over a substantial period while he converted the reels to cassettes and enhanced their sound quality. App. at 234-36. In argument before the district court, the government insisted that it had fully complied with the custody requirements of the unsealing orders because it had maintained a strict chain-of-custody of the tapes covering the time they were in Ginsberg's possession. App. at 253, 257-58.[6] The government further argued that, in any event, the tapes should not be suppressed because the gravamen of Vastola's and Saka's argument was that there had been an unauthorized disclosure of the contents of the tapes to a private individual in violation of 18 U.S.C. § 2517, so that their only available remedy was a civil claim as provided in section 2520 of the Wiretap Act. App. at 251, 255-57.

Finally, the government suggested that suppression of the tapes would be unfair because it had them enhanced at the behest of other defendants charged in the

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[5] In our previous opinion, we discussed at length the custody requirements of the unsealing orders and we will rely on that discussion herein. 899 F.2d at 237-39. We have set forth below certain additional facts regarding the proceedings before the district court which we did not have reason to address in our earlier opinion.

[6] In its Memorandum in Opposition to Defendants' Motion to Suppress the Tape Evidence, the government conceded that "there was a technical departure" from the unsealing procedure set forth in one of the unsealing orders. App. at 229.

original indictment whose cases had been tried before Vastola's and Saka's. In particular, the government argued that it sent the tapes to Ginsberg because, during the joint trial of Morris Levy, Dominick Canterino, and Howard Fisher, defense counsel complained about the audio quality of copies of the tapes the government had provided to them.[7] The attorney for the government, summarizing his argument on this point, said that:

> [I]t isn't often you have a situation where you have seven succeeding trials and now that

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[7] The attorney for the government stated:

> For trial purposes, particularly in the *Levy* trial situation, there were complaints by defense counsel in the *Levy* case that their copies were not very good. The originals had been unsealed. The originals had been unsealed for purposes of copying. We used the original and we made real [perhaps "reel"] time copies of that so that we would have the best available copy for the courtroom, meaning the jury could hear as clear to what was on that tape as was possible under modern technology to make. This benefitted the defendants and in fact was requested by the defendants because they said that they, their copies were just garbled and they wanted better copies.
>
> Each time they had a complaint about an individual conversation we took that conversation, we sent it to Paul Ginsberg under the strict procedures of accountability. We got it back and we sent the copy back onto the Levy defendants.
>
> They stated publicly in this courtroom that those copies were far superior to theirs that, in fact, they introduced our courtroom copies as a defense exhibit.

App. at 254-55.

> you're down the line that the defendants at the last trial will say, wait a minute, why were those unsealed and what were the procedures followed after the unsealing?

App. at 253.

He added that the tapes were sent to Ginsberg because it was not feasible in view of their enormous volume for the government to complete the enhancements in time for their use by the defendants at trial. App. at 253, 268-69.

In an unreported opinion, the district court denied suppression as it agreed with the government that the thrust of appellant's complaint was predicated on an unauthorized disclosure of the contents of the tapes for which suppression was not an available remedy. App. at 292-93. It further opined that the disclosure of the tapes to Ginsberg was incident to the government's trial preparation and thus was authorized by section 2517(2) of the Wiretap Act, which permits a government agent to "use" the contents of wiretap evidence "to the extent such use is appropriate to the proper performance of his official duties." 18 U.S.C. § 2517(2). Finally, the district court stated that there was no indication that Vastola and Saka had been prejudiced by the disclosure of the tapes to Ginsberg, as it appeared that the physical integrity of the original tapes was not affected in any manner by the enhancement process. App. at 294-95. The court indicated that it might reconsider the appellants' suppression motion if it appeared at trial that the integrity of the tapes had been compromised, but concluded that on the facts before it, it had no reason to suppress the tapes. *Id.* at 295.

As we set forth in our previous opinion, at trial Ginsberg testified that the tapes remained in a locked

storage container when he was not using them. Furthermore, he explained that "in the filtration process, there is no risk of alteration in the content of the enhanced copy, and that the original tapes are in no way modified." 899 F.2d at 239. Following Ginsberg's uncontroverted testimony, all of the tapes were admitted into evidence without further objection, app. at 507-08, on the understanding that the appellants reserved the right to challenge the government's use of individual tapes. App. at 530-31. It appears that at trial none of the tapes was suppressed on the basis of physical alterations made during the enhancement process.

On appeal to this court, appellants argued that, under section 2518(8)(a), the government's technical infraction of the custody requirements of the unsealing orders, standing alone, warranted the suppression of the tapes. 899 F.2d at 239. Appellants urged that the government's failure to comply strictly with the unsealing orders undercut the legislative intent of section 2518(8)(a) to ensure that the government has no opportunity to tamper with wiretap evidence. The government countered that section 2518(8)(a) furnishes a basis for the suppression of lawfully intercepted wiretap evidence only if there is no seal affixed to the tapes. 899 F.2d at 239-40. It maintained that its explanation for the absence of a judicial seal on the tapes was "satisfactory" because the tapes had been unsealed by court order. *Id.* In the alternative, it renewed its argument made before the district court that appellants' sole complaint was that there had been an unauthorized disclosure of the tapes' contents, conduct redressible only through a civil action under section 2520. *Id.* at 240 n.36.

We rejected appellants' argument that the government's infraction of the custody requirements of the unsealing orders warranted the suppression of the wiretap evidence, but not for the reasons advanced by the district court and the government. We departed from the district court insofar as it characterized appellants' claim as a challenge to the unauthorized disclosure of the tapes' contents to a private individual because, in our view, the thrust of the claim was that failure to enforce strictly the unsealing orders could undermine the statutory safeguards against tampering which pervade Title III. 899 F.2d at 240 n.36. We also rejected the government's argument that all lawfully intercepted wiretap evidence is admissible under section 2518(8)(a) if judicially sealed. This argument did not strike us as a plausible reading of the legislative intent underlying that section because, if followed, it would mean that all wiretap evidence would be admissible, regardless of whether it had been adulterated before sealing or after unsealing. While we recognized that Congress did not expressly define the government's responsibilities in handling tapes after their unsealing, to give full effect to the "overriding legislative concern . . . to prevent the admission of wiretap evidence which has been subject to tampering," 899 F.2d at 240, we concluded that government uses of tapes after their unsealing which might compromise the physical integrity of the tapes should be analyzed in the same manner as sealing delays.

This much said, relying on *Falcone*, we upheld the district court's decision to admit the wiretap evidence, as there was no indication that the integrity of the tapes had been compromised during the enhancement process. *Id.*

at 241. In reaching this conclusion, we were largely influenced by the fact that "compelling" and uncontroverted evidence had been presented that the enhancement process did not alter the contents of the tapes. *Id.* at 241-42. Accordingly, inasmuch as the Supreme Court had made clear in *United States v. Giordano,* 416 U.S. 505, 527, 94 S.Ct. 1820, 1832 (1974), that suppression is warranted only where there is noncompliance with statutory requirements that " 'directly and substantially implement the congressional intention' " underlying Title III, we decided that the technical infraction of the custody requirements of the unsealing orders could not serve as a basis for suppression, as there was no indication that "the type of harm the statute was meant to prevent occurred" in this case. 899 F.2d at 242.

II. The Rios Decision

By order dated June 25, 1990, the Supreme Court vacated our judgment and remanded the case to us for further consideration in light of *United States v. Rios,* 110 S.Ct. 1845 (1990), which was decided after our opinion in *Vastola* was filed. 110 S.Ct. at 3233. In *Rios,* the Supreme Court decided that the suppression of tapes derived from an authorized electronic surveillance is required where the government is unable to offer a "satisfactory explanation" for a delay in sealing the tapes in accordance with 25 U.S.C. § 2518(8)(a). In so holding, the Court expressly overruled *Falcone* and its progeny in other appellate courts. 110 S.Ct. at 1850 n.5.

The facts of *Rios* were similar to those here insofar as the sealing delay is concerned. Effective April 27, 1984,

the government originally obtained authorization to intercept communications at the defendant's residence in Levittown, Puerto Rico. Two extensions of the original order were granted, the second expiring on July 23, 1984. However, on July 9, 1984, the government terminated the surveillance because the defendant moved to a new residence in El Cortijo, Puerto Rico. 110 S.Ct. at 1848. On July 27, 1984, the government obtained a new surveillance order covering the El Cortijo residence which, after extensions, expired on September 24, 1984. After an additional surveillance order covering the defendant's car finally expired on October 10, 1984, the government, on October 13, 1984, had all of the tapes from the Levittown and El Cortijo residences judicially sealed. *Id.*

The Court of Appeals for the Second Circuit affirmed the district court's determination that the Levittown tapes were inadmissible because they should have been sealed at the latest on July 23, 1984, when the final extension order expired. *United States v. Ojeda Rios*, 875 F.2d 17, 22 (2d Cir. 1989). The court rejected the government's threshold argument that the El Cortijo surveillance order was an extension of the Levittown order, reasoning that, under the Wiretap Act, an extension order must cover the same location as the original surveillance order. *Id.* It similarly rejected the government's suggestion that its mistaken belief that the sealing obligation did not arise until there was a lapse in the investigation as a whole constituted a "satisfactory explanation" for the sealing delay. In this regard, the court stated that "[t]he privacy and other interests affected by the electronic surveillance statutes are sufficiently important" to preclude the government from relying on a misunderstanding of the law

as its explanation for a sealing delay. *Id.* at 23. Therefore, following its precedent that wiretap evidence may be suppressed on the basis of an unexplained sealing delay standing alone, *see United States v. Massino*, 784 F.2d 153, 156 (2d Cir. 1986), the court affirmed.

The Supreme Court agreed with the Court of Appeal's reasoning insofar as it held that the government's satisfactory explanation for a substantial delay in sealing wiretap evidence is a precondition to its admissibility under section 2518(8)(a), regardless of whether the authenticity of the tapes has been challenged. In doing so, the Court explained that a "satisfactory explanation" for a sealing delay is required by the literal language of section 2518(8)(a), and that any other reading of the section would eviscerate the force of the sealing requirement as a safeguard against tampering. 110 S.Ct. at 1849-50. It rejected our interpretation of the sealing requirement in *Falcone*, namely that the evidence could be admitted upon proof of nontampering even where a sealing delay is not satisfactorily explained, as inconsistent with the unambiguous language of the statute stating:

> It is true that offering to prove that tapes are authentic would be consistent with Congress's concern about tampering, but even if we were confident that tampering could always be easily detected, we would not be at liberty to agree with the Government, for it is obvious that Congress had another view when it imposed the sealing safeguard.

Id. at 1850 (footnote omitted).

Ultimately, however, the Court remanded the case for further factual inquiry into whether the government's

asserted belief that it had no obligation to seal the tapes until the conclusion of its entire investigation was its actual reason for the sealing delay. The Court did not decide when the obligation to seal in fact arose but, instead, stated that in view of existing Second Circuit precedent at the time of sealing delay, the government's explanation was "objectively reasonable" and hence would suffice as a "satisfactory explanation" if it was the actual reason for the delay. *Id.* at 1851.

III. *Discussion*

We have invited the parties to submit letter briefs addressing the admissibility of the wiretap evidence in view of the *Rios* decision. After carefully considering these submissions, we conclude that the government's relinquishment of custody of the tapes for audio enhancement does not require their suppression, as *Rios* has no bearing on the admissibility of wiretap evidence allegedly mishandled by the government subsequent to its unsealing. However, we will not reinstate our judgment affirming appellants' convictions at this time but will remand this case to the district court to decide whether the government is now free, under *Rios*, to offer an explanation for its violation of the sealing requirement. If the district court determines that such an explanation may be given there will be further factual inquiry into the reason for the government's delay in sealing the West Long Branch tapes.

A. *The Audio Enhancement*

Reading *Rios* and our prior decision together, appellants renew their argument that all of the tapes sent to Ginsberg for audio enhancement are subject to suppression. They believe that *Rios* significantly strengthens their position, as *Rios* characterized the sealing requirement in 18 U.S.C. § 2518(8)(a) as a "means of ensuring that . . . the Government has no opportunity to tamper with, alter, or edit the conversations that have been recorded." 110 S.Ct. at 1849. In view of our decision that challenges to the government's physical treatment of tapes after their unsealing should be analyzed in the same manner as sealing delays, appellants conclude that the government's relinquishment of custody of the tapes requires their suppression solely because it heightened the risk of tampering. They argue that, after *Rios*, our ultimate conclusion that the tapes could not be suppressed because they were proven to be authentic no longer is viable. We disagree.

Whereas the result in *Rios* was compelled by the "plain words of the sealing provision," *id.* at 1850, here we are concerned with a statutory interstice, as Congress did not expressly define the government's responsibilities in handling tapes after their unsealing. 899 F.2d at 240. We adhere to our reasoning that in view of the elaborate scheme it devised to ensure the authenticity of wiretap evidence, Congress could not have been indifferent to the treatment of tapes after their unsealing. *Id.* But when we decided that the enhancement problem could be analyzed in the same manner as a sealing delay, we did so under the assumption that we were extending the *Falcone* standard then followed in this circuit to the situation before us.

As Judge Rosenn pointed out in his dissent in *Falcone*, the majority departed from the plain language of the statute and, in effect, adopted a "harmless error" analysis of sealing delays. 505 F.2d at 487 (Rosenn, J., dissenting).[8] In fact, it could be argued that *Falcone* did no more than underscore the need for authentication of wiretap evidence in light of Congress's heightened concern about its physical integrity. Considering what *Falcone* actually held, namely that a sealing delay does not justify the suppression of wiretap evidence proven to be authentic, our extension of *Falcone* to situations arising after the judicial unsealing of the tapes was unremarkable. We held only that legislative silence as to the admissibility of surveillance tapes after their unsealing does not imply that adulterated tapes may contribute to a criminal conviction and therefore, the government must prove the tapes' integrity when confronted with a challenge to its physical treatment of them.

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[8] Judge Rosenn stated that:

> Congress expressly selected a strict requirement that the tapes not be admitted into evidence unless a satisfactory explanation is offered for a failure to seal them. Congress having expressly chosen a standard offering a significant protection to the citizen, I believe, in the language of *Giordano*, that the strict sealing requirement 'directly and substantially implements the congressional intention' of maintaining the integrity of the tapes. Therefore, it is my view that the majority is unjustified in creating an exception to the express language of § 2518(8)(a).

505 F.2d at 488.

Notwithstanding our prior decision, we would not be justified in reading section 2518(8)(a) as a mandate that any post-unsealing use of wiretap evidence capable of compromising its physical integrity must be satisfactorily explained before authenticated evidence can be admitted.[9] As construed in *Rios*, Congress created in section

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[9] Where there are statutory interstices in the sense that the statute's language does not explicitly resolve an issue which had arisen in the application of the statutory scheme, a court obviously has the power to decide the issue consistently with the legislative intent. *See, e.g., Stafford v. Briggs*, 444 U.S. 527, 535, 100 S.Ct. 774, 780 (1980) (deciding in face of legislative silence, that the venue provision of the Mandamus and Venue Act of 1962, 28 U.S.C. § 1391(e), necessarily is limited to mandamus-type actions). However, the role we may legitimately play when fleshing out the details of an elaborate statutory scheme is a modest one. In this regard, we are guided by the Supreme Court's statement in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 101 S.Ct. 1571 (1981), that:

> In almost any statutory scheme, there may a need for judicial interpretation of ambiguous or incomplete provisions. But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt. The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.

Id. at 97, 101 S.Ct. 1583-84 (citation omitted).

See generally Glus v. G.C. Murphy, 629 F.2d 248, 259-65 (3d Cir. 1980) (Sloviter, J., dissenting) (elaborating on the differences between the evolution of federal common law, statutory interpretation, and the judicial usurpation of legislative functions), *vacated and remanded sub nom. Retail, Wholesale and Dep't Store*

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2518(8)(a) an extraordinary safeguard against adulteration during the period between interception and trial. However, its failure to extend that remedy to post-unsealing situations was not necessarily an oversight. Possibly, Congress determined that the myriad uses which prosecutors legitimately could have for unsealed wiretap evidence would render it impractical to require judicial scrutiny of the prosecutor's motivation in each such instance. Furthermore, even in the case of judicially sealed tapes, violation of the *statutory* mandate that "custody of the recordings shall be wherever the judge orders," does not trigger the suppression remedy. 18 U.S.C. § 2518(8)(a). Considering this circumstance, we would be hard pressed to find that Congress required anything more than proof of authenticity where the custody requirements of unsealing orders technically have been violated.[10]

Moreover, even if we were to construe section 2518(8)(a) as appellants suggest, the government's relinquishment of custody of the tapes would not supply us

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Union, AFL-CIO v. G.C. Murphy, 451 U.S. 935, 101 S.Ct. 2013 (1981), *reversed in part on remand*, 654 F.2d 944 (3d Cir. 1981). Here, it is highly questionable whether we may place greater limitations on the admissibility of unsealed wiretap evidence than the legislative expressly imposed.

[10] We note our disagreement with *United States v. Riggi*, 737 F. Supp. 1410, 1415 (D.N.J. 1990), which concluded that "it would be jurisprudentially myopic to hold that the Supreme Court's opinion in *Ojeda Rios* is limited to initial judicial sealing and precludes consideration of situations pertaining to judicial unsealing and resealing."

with reason to order their suppression. Neither the statute nor *Rios* takes a *per se* approach to sealing delays nor, by implication, to unsealing problems. Rather they permit the government to defeat a suppression motion by proving the tapes' authenticity and by furnishing a satisfactory explanation for the statutory violation. The Court of Appeals for the First Circuit which, since *United States v. Mora*, 821 F.2d 860, 867-68 (1st Cir. 1987), has followed the construction of the sealing provision adopted in *Rios*, held in *United States v. Angiulo*, 847 F.2d 956 (1st Cir.), *cert denied*, 488 U.S. 928, 109 S.Ct. 314 (1988),[11] that:

> If the unsealing of such tape is challenged in a motion to suppress, the government should be required to prove (1) that the unsealing and use of the tapes did not result in alterations or tampering and (2) that the circumstances necessitating unsealing were not manufactured for tactical gain and that the defendants will not be unduly prejudiced as a result of the unsealing.

Id. at 978.

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[11] *Angiulo* is especially pertinent because it involved a challenge to the unsealing of tapes for audio enhancement. 847 F.2d at 976. Of course, this case is one step further removed from the statute, as here, appellants do not challenge the propriety of the unsealing orders themselves, but focus on Ginsberg's enhancement of the tapes subsequent to their unsealing.

We acknowledge that with respect to certain New Jersey state tapes, appellants do contest the fact of unsealing. Letter Brief at 9 n.9. We reiterate our observation that the government's "technical infraction" of the unsealing orders for those tapes, namely that they be unsealed in the presence of a federal district court judge, "does not negate the fact that the unsealing orders were entered and executed." 899 F.2d at 211 n.34.

The *Angiulo* standard is readily satisfied here. As we found in our prior decision, Ginsberg's testimony supplied ample proof that the physical integrity of the tapes remained pure. 899 F.2d at 241-42. While the district court made no specific finding of fact on this point,[12] there can be no doubt as to the sufficiency of the government's factually unchallenged explanation that it sent the tapes to Ginsberg's firm because of the exigencies of the *Levy* trial, as it could have completed the enhancements in time for them to be of use to the defendants had it relied on its own facilities. The events which necessitated the enhancements hardly could be said to have been "manufactured" by the prosecutors "for tactical gain." To the contrary, in the context of a multi-defendant case which has been severed for successive trials, it would be grossly unfair to the government to hold that audio enhancements performed for the benefit of one set of defendants could be the basis for suppression of the wiretap evidence in succeeding trials.[13] Accordingly, we reject appellants' contentions regarding the enhancement of the surveillance tapes.

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[12] Although the district judge did not address this issue in his opinion, he did preside over the *Levy* trial and during the government's argument, he indicated that he recalled the dispute over the audio quality of the tapes. App. at 255a.

[13] We are not to be understood as suggesting that after severance, representations made by defendants in an earlier trial are binding on defendants in a later trial. However, in the problem before us, our focus must be on the government's reasons for sending the wiretap evidence to a private individual for enhancement.

B. *The Sealing Delay*

Having determined we cannot justify the broader relief sought by appellants, that is, the suppression of all of the enhanced wiretap evidence, we must consider their more particularized contention that, in light of *Rios*, the West Long Branch tapes were subject to suppression because of the unexplained sealing delay.

The government advances several arguments why appellants' convictions should be reinstated notwithstanding *Rios* and the demise of *Falcone*. First, it submits that no sealing delay occurred because the order of June 26, 1985, authorizing electronic surveillance at Video Warehouse's new location in Neptune City, New Jersey, was an extension of the original authorization for the West Long Branch surveillance and its accompanying extensions, so that its obligation to present the tapes for sealing did not arise until the conclusion of the Neptune City surveillance. Second, relying largely on *Rios*, it argues that even if the the June 26, 1985, order could not be characterized as an extension order, the supervising attorneys, based on precedent at the time of the surveillance, reasonably believed that the sealing obligation would arise at the conclusion of the entire Video Warehouse investigation. Thus, we should find that the government has furnished a "satisfactory explanation" for the delay. Seemingly in the alternative, the government maintains that resolution of the sealing question is not necessary because even if the tapes covering the West Long Branch surveillance were suppressed, there would be sufficient evidence to sustain Vastola's and Saka's convictions on practically all counts. Accordingly, in the government's view, the admission of the tapes was at

worst, harmless error. Finally, the government suggests that we remand for further factual inquiry into the reason for the sealing delay if we find that we cannot reinstate our opinion affirming appellants' convictions at this juncture.[14]

We agree with the government that the matter should be remanded to the district court. But we cannot accept its argument that our original judgment should now be reinstated. We could not possibly hold that the Neptune City interception order was an extension of the West Long Branch order. Although the government rightly points our that *Rios* did not decide whether a change in the location of an illegal operation will prevent a subsequent order covering the new location from being an extension of a previous order, the statute unambiguously rules out this possibility.[15]

Section 2518(1)(b)(ii) plainly states that an application for a surveillance order must contain "a particular description of the nature and location of the facilities

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[14] Appellants rigorously contest each of these assertions. We will address their arguments in the course of our discussion.

[15] Curiously enough, in arguing that the Neptune City order was an extension of the West Long Branch order, the government relies on *United States v. Vazquez*, 605 F.2d 1269, 1278 (2d Cir.), *cert. denied*, 444 U.S. 981, 100 S.Ct. 484 (1979), which, in its view, stands for the proposition that the term, "extension," encompasses all continuations of wiretap orders involving the same crimes and substantially the same persons. We would be hard pressed to read *Vazquez* so broadly, as the Court of Appeals itself expressly rejected that interpretation of the case in *Ojeda Rios*, 875 F.2d at 21-22.

from which or the place where the communication is to be intercepted." In addition, section 2518(3)(d) requires a particularized showing of probable cause that "the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in the commission of [the] offense [under investigation]." Based on these two provisions alone, we would have no difficulty concluding that Congress intended for interception orders, and their accompanying extensions, to apply only to surveillances in the particular locations specified in the applications.

Moreover, even if we felt that subsections (1)(b)(ii) and 3(d) of section 2518 were susceptible to a different interpretation, we would still reject the government's argument, as we agree with the Court of Appeals' statement in *Ojeda Rios*, 875 F.2d at 22, that section 2518(11), added to Title III as part of the Electronic Communications Privacy Act of 1986, § 106(d)(3), Pub.L.No. 99-508, 100 Stat. 1848, 1857, *reprinted in* 1986 U.S. Code Cong. & Admin. News, at 1848, 1857, eliminates all room for argument on this point. Section 2518(11) provides for roving surveillances of wire or electronic communications upon a showing of the suspect's "purpose" "to thwart interception by changing facilities." Section 2518(11) further states that if the preconditions for a roving surveillance are met, then "the requirements of subsections (1)(b)(ii) and 3(d) . . . relating to the specifications of the facilities from which, or the place where, the communication is to be intercepted do not apply." The unmistakable inference from the language of subsection (11) is that before its inclusion in section 2518, subsections 2518(1)(b)(ii) and 3(d) restricted surveillances to particular locations,

regardless of whether the same suspects and crimes were involved.

We conclude that a sealing delay indeed occurred as the West Long Branch tapes should have been sealed either as soon as was practical after May 31, 1985, when the actual surveillance ended, or as soon as practical after June 13, 1985, when the final extension order expired.[16]

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[16] The government argues that the length of the sealing delay should be measured from June 13, 1985, when the final extension order expired. There is certainly support for that position as the statute states that the government's sealing obligation arises "[i]mmediately upon the expiration of the period of the order, or extensions thereof . . . " 18 U.S.C. § 2518(8)(a). *See United States v. Harvey*, 560 F. Supp. 1040, 1057 (S.D. Fla. 1982), *aff'd*, 789 F.2d 1492 (11th Cir.), *cert. denied*, 479 U.S. 855, 107 S.Ct. 192 (1986) ("Case law clearly holds that the tapes do not have to be sealed until the end of the extension orders, i.e., at the termination of the entire surveillance."). Furthermore the Supreme Court in *Rios* read section 2518(8)(a) literally. We also observe that it might not be clear that surveillance has ended as an interruption could be viewed at the time only as a hiatus. There is, however, a basis to support appellants' contention that there should have been sealing as soon as practical after the surveillance ended. Section 2518(5) seems pertinent to situations where a surveillance terminates before expiration of the final interception order, and it provides that "[n]o order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization. . . . " Furthermore, the legislative history indicates that: "The period of authorized interception is intended to begin when the interception – in fact – begins and terminates when the interception – in fact – terminates." S. Rep. No. 1097, 90th Cong., 2d Sess. 107, *reprinted in* 1968 U.S. Code Cong. & Admin. News, at 2112,

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Furthermore, we cannot now on the record before us accept the government's suggestion that, even if erroneous, the supervising attorneys' reasonable belief that the order of June 26, 1985, extended the original interception order satisfactorily explains the delay.[17] Appellants understandably protest that the government's belated explanation not only is unsupported by the record but contradicts its specific assertions to this court and the district court that a delay occurred but that, under *Falcone*, it could not serve as a basis for suppression because the physical integrity of the tapes remained pure. They argue that government cannot now change its position and assert that it operated under the assumption that the Neptune City order extended the original order.[18] *See Steagald v. United States*, 451 U.S. 204, 208, 101 S.Ct. 1642, 1646 (1981) ("The government, however, may lose its

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2192. Here we need not resolve the issue as even taking the June 13, 1985, date it cannot be said that the tapes were made available to the judge "immediately" upon the expiration of the period of the order.

[17] With respect to the two reels of tape which were sealed on August 19, 1986, we accept the district court's finding that the government's clerical error in storing the original tapes constituted a satisfactory explanation for the delay. Accordingly, we will not further consider the implications of the additional delay in the sealing of those two reels.

[18] We note that in *Rios*, Justices O'Connor and Blackmum joined the majority opinion on the understanding that it held that any explanation for a sealing delay must be the "actual reason" for the delay, rather than a "reasonable explanation" offered on appeal. 110 S.Ct. at 1851-52 (O'Connor, J., concurring, joined by Blackmum, J.). Without these votes, *Rios* may have been a plurality decision, as three justices dissented.

right to raise factual issues . . . when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.").

Although we do not at this time accept the government's explanation for the delay, we find that its failure in the district court to offer evidence concerning the circumstances of the sealing delay should not necessarily now foreclose it from offering such evidence before the district court. We acknowledge that the circumstances of this case differ slightly from *Rios* because there the government seems to have offered some explanation for the delay at trial, though a question as to whether it had shifted its position on appeal remained. Here, however, the government relied under *Falcone* on the physical integrity of the tapes.

We do not consider this difference between the two cases to be significant on the issue of whether the government should now be able to explain the delay in the district court. *Rios* arose in the Second Circuit which, since *United States v. Gigante*, 538 F.2d 502, 505 (2d Cir. 1976), has held that the government must prove a satisfactory explanation for a sealing delay before wiretap evidence may be admitted over a defendant's objection. In this case, while it is possible that the government offered no explanation for the delay because it had none, it is also possible that, acting in reasonable reliance on *Falcone*, it assumed that it could defeat the suppression motion by demonstrating the integrity of the tapes and thus did not find it necessary to introduce evidence on this point. Accordingly, we conclude that the district

court should be entitled to exercise its discretion to decide whether the government should now be permitted, under *Rios*, to offer an explanation for its violation of the sealing requirement. It seems to us that this threshold determination should be made by the district court rather than by us as the nature of the determination is similar to that on a ruling on a motion by the government to reopen, traditionally a discretionary matter for the district court. *See United States v. Blankenship*, 775 F.2d 735, 740-41 (6th Cir. 1985).

While we are remanding the matter we think it appropriate to comment on the appellants' argument that the government could not reasonably rely on *Falcone* because that case's continued viability was questionable at the time of trial in light of intervening precedent. We do not agree. To be sure, before *Rios*, the Courts of Appeals for the First and Second Circuits had followed the literal construction of section 2518(8)(a) adopted by the Supreme Court, *United States v. Mora*, 821 F.2d at 864-65; *United States v. Massino*, 784 F.2d at 156. However, several other courts of appeals agreed with our holding in *Falcone* that lawfully intercepted wiretap evidence could not be suppressed on the basis of a sealing delay if the tapes were proven to be authentic. *United States v. Angelini*, 565 F.2d 469, 473-74 (7th Cir. 1977), *cert. denied*, 435 U.S. 923, 98 S.Ct. 1487 (1978); *United States v. Diadone*, 558 F.2d 775, 780 (5th Cir. 1977), *cert. denied*, 434 U.S. 1064, 98 S.Ct. 1239 (1978); *McMillan v. United States*, 558 F.2d 877, 878-79 (8th Cir. 1977). Thus, the district court might conclude that it would not fairly characterize any reliance

the government may have placed on *Falcone* as unreasonable, especially considering that the government correctly predicted that we would adhere to that decision.

We have not overlooked the appellants' complaint that the government, in arguing that it reasonably believed it had an extension, already has proffered an explanation for the delay and should not be allowed a second bite at the apple before the district court. However, we do not think that the district court is necessarily compelled to conclude that a waiver would be appropriate in this case, as the government first advanced its explanation in the same submission in which it asserted a need for further factual inquiry into the reason for the delay. We emphasize, however, that upon remand, if the district court permits that explanation of the sealing delay to be given, the government must prove to the court's satisfaction the *actual* reason for the sealing delay. This would require a formal hearing in which the government corroborates its arguments to the district court through authenticated records produced at the time of the sealing delay, the testimony of individuals who participated in the interceptions, or other competent evidence.

In view of our decision to remand this case, we do not reach the question of whether the admission of the West Long Branch tapes could be considered harmless error.[19] We realize, of course, that if we concluded that a

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[19] Appellants have raised the additional contention that if the West Long Branch tapes are suppressed, it will be necessary to reconsider the admissibility of other wiretap evidence

(Continued on following page)

high probability exists that the evidence in the tapes did not contribute to appellants' convictions, we could save judicial resources by reinstating our opinion affirming appellants' convictions, thus obviating the need for a hearing. *See United States v. Jannotti*, 729 F.2d 213, 219-20 n.2 (3d Cir.), *cert. denied*, 469 U.S. 880, 105 S.Ct. 243 (1984) (defining the "high probability" standard of appellate review used to determine the harmlessness of nonconstitutional errors in the admission of evidence); *Government of the Virgin Islands v. Toto*, 529 F.2d 278, 284 (3d Cir. 1976). However, if the tapes should have been suppressed, the extent of the damage to the government's case could not easily be assessed, as suppression of the tapes would remove the basis for certain other evidence presented in this case, such as Sergeant Robert Jones' explanation of loansharking terms used in the intercepted

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(Continued from previous page)

presented in this case, as information derived from the West Long Branch tapes was used, in part, to establish probable cause for subsequent surveillances. We have located only one case which squarely addresses this issue, and it holds that lawfully intercepted conversations may be used to establish probable cause for an electronic surveillance, regardless of whether the conversations are themselves inadmissible because of an unexplained sealing delay. *United States v. Fury*, 554 F.2d 522, 531-32 (2d Cir. 1977), *cert. denied*, 436 U.S. 931, 98 S.Ct. 2831 (1978). *Cf. United States v. Donlan*, 825 F.2d 653 (2d Cir. 1987) (section 2518(8)(a) does not bar the admission of evidence obtained through a search made on the basis of statements set forth in untimely sealed surveillance tapes). However, we acknowledge that different interpretations of the statute are possible and express no opinion on the issue at this time as it would be premature to do so. Indeed, depending upon the results on the remand, it is possible that the issue may never have to met.

conversations. App. at 694-95, 733-34.[20] Considering that a possibility exists that the sealing delay will be satisfactorily explained, we think it best not to pass judgment on the murkier question of the harmlessness of the purported error. If necessary that issue maybe reached on the remand.

IV. *Conclusion*

In view of the foregoing, we will remand Vastola's and Saka's cases to the district court for further proceedings in light of *United States v. Rios* and this opinion.

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[20] Sergeant Jones, testifying as an expert, interpreted statements made by Vastola and co-conspirator Sonny Brocco in a April 26, 1985, conversation that they could "put it out for two" or "for three," app. at 3385, to be "terms used in loanshark loans" for percentage points. App. at 734. He construed Vastola's statement in a April 5, 1985 conversation at the Video Warehouse that "[e]verybody that I okay to Rudy for money is fuckin' up cause they think they got me as a buffer," app. at 3356, to mean, "we okayed them to Rudolph Farone for loanshark[ing]." App. at 695. In all, Jones' direct testimony regarding the contents of the West Long Branch tapes spanned approximately 100 pages of transcript. App. at 642-743.

APPENDIX IV

Filed: March 20, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5372, 89-5383, 89-5510

UNITED STATES of America,
Appellee at Nos. 89-5372/5383,
Appellant at No. 89-5510

v.

GAETANO VASTOLA, Appellant at No. 89-5372,
Appellee at No. 89-5510

v.

ELIAS SAKA, Appellant at No. 89-5383

On Appeal from the United States
District Court for the
District of New Jersey
(D.N.J. Criminal No. 86-301)

Argued February 6, 1990

BEFORE: GREENBERG, SCIRICA, and
SEITZ, *Circuit Judges*

(Filed March 20, 1990)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

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I. INTRODUCTION

Gaetano Vastola and Elias Saka appeal to this court from final judgments of conviction and sentence entered by the United States District Court for the District of New Jersey on May 3, 1989, following a jury trial in which they were found guilty of two substantive RICO offenses under 18 U.S.C. § 1962(c), a RICO conspiracy offense under 18 U.S.C. § 1962(d), and a conspiracy to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. § 894. In addition, Saka was found guilty of various other extortion offenses and of mail and wire

bankruptcy and insurance fraud. The United States, pursuant to 18 U.S.C. § 3731, appeals from an order of the district court, entered on April 28, 1989, granting Vastola's post-conviction motion for a judgment of acquittal on one of the two substantive RICO counts.

Appellants originally were indicted along with nineteen other defendants in a 114 count indictment charging a variety of crimes. By opinion and order dated September 1, 1987, the district court severed the case for separate trials. *United States v. Vastola*, 670 F. Supp. 1244, 1261 (D.N.J. 1987). Vastola and Saka ultimately were tried on a twenty-six count redacted superseding indictment, filed on February 23, 1989, which named Saka in twenty-five counts and Vastola in fourteen. Both appellants were sentenced to total prison terms of twenty years and, in addition, Vastola was ordered to pay fines totalling $70,000 and Saka was ordered to pay fines totalling $185,000.

On appeal, Vastola contests the sufficiency of the evidence to support his convictions for the extortionate collection conspiracy charged in Counts 4 and 9 of the superseding indictment, and the substantive RICO offense charged in Count 2. He also asserts various grounds for reversal of his RICO conspiracy conviction under Count 3, including an alleged defect in the jury instructions and insufficiency of the evidence of his involvement in the predicate acts underlying the conspiracy. Finally, he raises various challenges to the conduct of the trial itself, arguing, in part, that he suffered irreparable prejudice because of the government's denomination of the criminal enterprise as the Vastola Organization, and because of the district court's admission of expert

testimony regarding the meaning of loansharking terms used by appellants.

Saka argues that the district court erred as a matter of law when it denied his pretrial motion to suppress tape recordings from the government's electronic surveillance of appellants' communications, on the ground that the government violated the Wiretap Act, 18 U.S.C. § 2510 et seq., when it relinquished custody of the tapes to a private party for enhancement. He also maintains that the district court abused its discretion when it denied his pretrial motion for appointment of new counsel and when it refused to suppress certain evidence seized pursuant to overbroad search warrants.

Finally, the government, in its appeal of the district court's grant of judgment of acquittal for Vastola on Count 1 of the superseding indictment, has advanced the legal question of whether the RICO conviction may stand, notwithstanding Vastola's acquittal of separately charged offenses making up three of the four predicate racketeering acts charged in the indictment.

We have considered the arguments raised by Vastola and Saka to the extent that they relate to both appeals, as Vastola and Saka have adopted each others' arguments pursuant to Fed. R. App. P. 28(i). Based on our review of the record, we agree with Vastola that there was insufficient evidence to support his RICO conviction under Count 2, and will reverse the district court's order entering judgment of conviction and sentence on that count. We also have determined that the district court erred as a matter of law in granting Vastola's motion for judgment of acquittal on Count 1, and therefore will reverse the

order challenged in the government's appeal and remand Vastola's case for entry of judgment of conviction on Count 1 and for resentencing. In all other respects, under the applicable standards of review, we see no basis to disturb the district court's order with respect to Vastola, and will affirm his convictions on Counts 3, 4, and 9 of the superseding indictment. We will affirm Saka's convictions on all counts.

II. THE FACTS

The prosecution's theory, as reflected in its opening statement, was that Vastola headed a "secret criminal enterprise," the "Vastola Organization," which "encouraged, aided and profited from" the illegal activities of its members. Ranking members of the enterprise were alleged to include Saka, "who came up with most of the fraudulent schemes the organization profited from" and Vastola's cousin, Palmer ("Sonny") Brocco, who carried out Vastola's orders. The enterprise was headquartered at the Video Warehouse in Monmouth County, New Jersey.

The indictment attributed various crimes to the enterprise, including a conspiracy to use and use of extortionate means to collect an extension of credit to John LaMonte in connection with a record purchase from MCA Records, Inc., numerous usurious loans, "bust-out" schemes to defraud suppliers to businesses controlled by the enterprise, and insurance and bankruptcy frauds. We will set forth the circumstances of only the two of these crimes necessary to our discussion.

1. The Dwek Loan

Dwek was an executive at Chams Clothing Company. He testified that when he left the company, he negotiated a financial settlement which ultimately yielded him $40,000 in return for his relinquishment of certain contract rights. When that money was not immediately forthcoming, he began to experience "financial difficulty." A friend of his, Ralph Setton, put him in contact with Saka.

Saka and Dwek met in February, 1985 to discuss Dwek's prospects for obtaining a loan. Saka told Dwek that he could deliver $10,000 in cash within a day which would be payable at an interest rate of $250 per week. They consummated the deal in a subsequent meeting, at which Sonny Brocco gave Dwek $10,000 in cash. The debt was evidenced by a promissory note which did not contain any interest rate terms.

Dwek testified that he regularly paid the interest on his loan at the Video Warehouse and would give the money to whoever was present, normally, Saka. Sonny Brocco or Nick Massano. However, he understood Saka to be the obligee. When Dwek's settlement from Cham Clothing was further delayed, he borrowed an additional $5,000 from Saka at an interest rate of $125 per week. Dwek further testified that he saw Vastola at the Video Warehouse about two or three times over a six month period and knew him to be Saka's landlord.

Around this time, Dwek also entered a partnership with Saka to market a perfume developed by a clothing company called Jou Jou. They agreed to become equal partners, with Saka supplying the financing and Dwek, the business expertise. Although Saka and Dwek did not

go far in this venture because the "monetary funds" were unavailable, they did form a small corporation for the purpose of effectuating the Jou Jou deal and Saka attempted to flesh out the details of how the profits would be allocated.[1]

In any event, Dwek soon fell behind on his interest payments. In a telephone conversation on May 7, 1985, Brocco did not mince words on the subject of Dwek's lateness:

> I don't appreciate get'n fucked around by you! Ya know what I mean, you said 10:30. You know what time it is now? And you been jerk'n me off for two weeks. Now how do you want to handle

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[1] On July 3, 1985, Saka, in a conversation with an individual identified in the transcript as an "unknown male," stated:

> So now what we're supposed to do is go fifty fifty with Dwek. But now what we're talking about with Dwek we ain't gonna do that, we're gonna tell Dwek listen, you get a third, I get a third, they get a third. That's the way we should do it. Or may give them forty percent, but we want control. . . .

Appendix at 3555.

Saka went on to discuss the level of "salary" which would be paid Dwek, and mentioned that he and Sonny had been contemplating paying Dwek $500 per week, to which the unknown male responded, "(UI) the five, we gonna pay him five hundred a week?" Saka explained that the salary was "part of our expenses."

In summation, the government argued that the unknown male was Vastola and that the subject of the conversation was the unlawful loan to Dwek. From the context, however, it would seem that Saka was referring to his partnership with Dwek on the Jou Jou perfume deal.

> this? Do you want me to come over there and strangle you, is that what you want?

Appendix at 3244.
Dwek understandably replied, "No Sonny." *Id.*

On April 22, 1985, Saka and Brocco assessed the status of Dwek's debt. Saka reminded Brocco that Brocco had given Dwek $10,000 and that Saka had later given him $5,000. They concluded that Dwek owed them $15,000 plus the "juice," and that, of the principal, Brocco was entitled to $2,500. According to the government, Saka then pointed out, "I never squared you with Tommy [Vastola]."[2]

The subject of Dwek's debt also came up in a conversation among Vastola, Saka and Brocco on April 26, 1985. After discussing various other loans, Vastola asked Saka, "what happened with that guy that had the problem with that guy that, uh, remember we met him here?" Saka explained the difficulties Dwek was experiencing in reaching a settlement with Chams Clothing and Vastola, referring to Dwek's former partners at Chams asked if they had gotten "a piece." Brocco then informed Vastola that when Dwek reached a settlement, "they" were going to lay claim to at least part of it. Vastola responded, "Take a piece (UI) give up a little bit, if it wasn't on account of

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[2] Although this statement appears in the transcript, Vastola claims that it is not on the tape. In its answering brief, the government never directly asserts that the statement is on the tape but instead, argues that Vastola waived any objections to the transcript because he failed to raise them at trial.

you people. He would have gotten nothing."[3] Brocco questioned whether they had a claim to Dwek's settlement and Saka asserted that "it doesn't hurt to ask. All's he can say is no." To this Vastola argued. "Tell him, he's gotta put somethin' in the side. After all you came here for backup, you had the backup if there had been a problem. . . . So now you settled."

Dwek settled with Cham Clothing in April, 1985 and paid the $10,000 loan off in one lump sum payment. He paid off the $5,000 loan in September, 1985.

2. The MCA Deal

In early 1984, MCA Records, a Los Angeles based corporation, agreed to sell several million "cut-out" records and tapes,[4] valued at approximately $1,750,000, to Salvatore Pisello, an individual connected with Consultants for World Records, Inc. The only document evidencing the transaction was a purchase order from Roulette Records, the guarantor of the sale price. Roulette Records was owned by Morris Levy who was identified in the indictment as Vastola's and Saka's co-conspirator. Although there was no written agreement between MCA and Pisello, MCA officials understood Pisello to be the buyer in the transaction.

Pisello and Levy approached Vastola to find a buyer for the records and Vastola recommended John LaMonte, who owned a record distribution company called Out of

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[3] "UI" refers to unintelligible.

[4] "Cut-out" is an industry term for obsolete merchandise. Appendix at 853.

the Past, Ltd. LaMonte had served time in a federal penitentiary with Vastola's cousin, Palmer ("Sonny") Brocco, and apparently Brocco suggested LaMonte to Vastola because he owed LaMonte a favor.

Pisello accepted LaMonte as buyer and the deal was consummated in the summer of 1984, when MCA shipped the records, at Roulette's request, to Betaco Enterprises in Brentwood, California, a customer of Pisello, and to LaMonte's company, Out of the Past, Ltd., in Darby, Pennsylvania. In 1984, MCA received sporadic payments for the records shipped to Pennsylvania from Pisello's company, Consultants for World Records, Inc., but no payments were forthcoming from January 1985 on. At that time, the balance due was approximately $800,000. MCA then looked to Roulette Records as the guarantor and eventually asked Pisello for assistance in securing the return of the merchandise. Out of the Past sent back a substantial number of records in mid-1985, leaving an outstanding balance of approximately $350,000.

MCA's Chief Financial Officer, Daniel McGill, then repeatedly telephoned Morris Levy and his associate, Howard Fisher, demanding payment of the remainder of the debt. As a result of those conversations, MCA received two additional checks, a check for $125,000 dated October 9, 1985, and a check for $120,000 dated January 29, 1986. The remaining balance of $100,000 was never paid to MCA.

The deal unravelled because LaMonte had failed to pay for the merchandise he received from MCA. LaMonte was expected to pay for the merchandise itself plus

$300,000 in profits, which was to be divided equally among Pisello, Levy and Vastola as partners in the transaction.[5] LaMonte paid about $30,000 in cash. The remainder of his payments were in notes, most of which bounced.

As Vastola's and Levy's frustration with LaMonte mounted, they, along with Saka and Brocco, began formulating plans to recover either the balance due them or the

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[5] On appeal, Vastola strenuously denies that he was partners with Pisello and Levy and insists that he was aligned with LaMonte. Although the record is somewhat unclear as to whether Vastola was involved in the early stages of the deal, there is considerable support for the government's proposition that Vastola formed a partnership with Levy and Pisello, at least as of the time that LaMonte was brought into the deal. In an argument between Vastola and Levy over Vastola's entitlement to a percentage of profits derived from a sale made before the delivery to LaMonte, the following exchange took place:

> VASTOLA: So we're, we're only partners with the, with the losses and not the wins?
>
> LEVY: You weren't a partner on that first part of the load.
>
> VASTOLA: Why not?
>
> LEVY: Because you weren't. You came in with John [LaMonte]. You came in with John and, and . . .
>
> VASTOLA: I was in with me, you and him and your partner before John got in. Me, you and him and your partner was in with that six million records, we'll cut it up three ways.

Appendix at 3751-52.

merchandise. At the same time, Levy, with recurring frequency, blamed Vastola for bringing LaMonte into the deal and exerted pressure on him to get LaMonte to pay.

On December 18, 1984, Vastola instructed his cousin Brocco to get hold of LaMonte because "every fuckin' body is screamin' over those fuckin' payments, the notes, and that. . . . " He added that Levy and his associates were holding Brocco responsible for LaMonte's conduct because he had assisted LaMonte in negotiating the deal and that "[t]hey want[ed] [Brocco] to sit in the fuckin' joint, [LaMonte's warehouse] there and don't make a record go in and out until this money's paid." Later that day, when Fisher called Video Warehouse, Saka assured him that he, Brocco, and Vastola intended to visit LaMonte, and that Vastola planned to "read [LaMonte] the riot act."

The following day, Vastola told Saka that he planned to install Brocco in LaMonte's business to ensure that no merchandise or money was removed before Levy was paid: "the money's got to be taken and sent to Morris [Levy]. I don't care what [LaMonte's] business is."

On January 10, 1985, Brocco informed Vastola that LaMonte had disclaimed responsibility for any debt to MCA on the ground that he was liable only to World Wide Consultants.[6] Vastola responded: "[T]his guy is aggravating me, you know. . . . I tell you the truth he had me at a stage last night, I'll tell you the truth, that if I had

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[6] The transcript refers to "World Wide Consultants." Given the similarity in names, we believe that the reference is to Pisello's company, "Consultants for World Records, Inc."

him in front of me I would have broke his ass." Less than two hours later, Vastola again called Brocco and instructed him to drive to LaMonte's company and pick up a check for $629,000. He added that if LaMonte failed to cooperate, he would "put him in a fuckin' hospital."

Vastola called Brocco again on January 10, 1985, and reiterated his demand that Brocco pick up the check for $629,000 from LaMonte. Apparently, Pisello was in town and had delayed his return trip to California until he received payment from LaMonte. Vastola, pressured by Pisello, again expressed his exasperation with LaMonte and indicated that he was practically resolved in turn LaMonte over to his partners so that they could attempt collection from him: "[I]t's going to come to the point I'm gonna tell Rudy, ah . . . Sal [Pisello], everybody, go over there, do whatever you want." Apparently, Brocco was unable to obtain the check from LaMonte.

At some point in the ensuing month, LaMonte sent notes worth $300,000 to Pisello and Levy in partial payment of his debt. Unfortunately, the notes bounced and Pisello and Levy had to pay the banks $90,000 to cover them. On February 13, 1985, Vastola complained to Saka that he probably would be held responsible for $30,000 of the bank charge, because it was "a three way partnership, it's 30, 30, 30." He further opined that the situation with LaMonte was becoming so disastrous that it might become necessary "to put two guys there to control [LaMonte's] whole business." Saka agreed, and suggested that they might be doing LaMonte a favor because his business judgment was so poor.

Over the ensuing months, Vastola, Saka, and Levy repeatedly discussed the possibility of seizing control of LaMonte's business to satisfy his debt. On April 8, 1985, Vastola, Saka and Levy had a three-way conversation in which they considered whether LaMonte could repay the debt at a rate of $30,000 per week. Levy believed that LaMonte had money "coming in by the thousands" and that he could meet that payment schedule. On the subject of Brocco's apparent inability to get LaMonte to pay, Saka suggested that Brocco felt a certain amount of loyalty to LaMonte. Vastola responded: "He can't have an obligation to him over me. . . . His first obligation is here."

In May, 1985, during the course of a meeting between Vastola, Brocco, Saka and LaMonte, Vastola punched LaMonte in the nose, causing him to spend at least four days in a hospital. Vastola and Saka agreed that LaMonte deserved to be punched because he had gotten "totally out of line." Later, referring to the incident, Saka said to Levy and Vastola that he could not understand how after Vastola "busted his jaw" LaMonte "still [had] the balls not to come up with the money."[7]

On September 23, 1985, a two hour meeting, attended by Vastola, Saka, Levy, Fisher, and Dominick Canterino took place at Roulette's Manhattan offices.[8] The primary

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[7] It appears that LaMonte's period of active cooperation with the government began during his hospitalization, as LaMonte became an informant on May 18, 1985.

[8] Canterio, Levy and Fisher were charged in the original indictment filed in this case and, following a joint trial, were found guilty under 18 U.S.C. § 894 of an extortionate collection

(Continued on following page)

topic of conversation was LaMonte's debt. After considerable haggling over who was responsible for LaMonte's behavior, the parties agreed to make LaMonte ship the records back to MCA the following Friday:

> CANTERINO: How do we resolve this now?
>
> VASTOLA: All right we're resolving it this way if it's all right with everybody. We're going over there Friday morning, we're gonna make him ship back all the stuff that . . .
>
> SAKA: Two hundred forty four thousand.
>
> LEVY: Even a little more.
>
> SAKA: Let's ship back four hundred.

Appendix at 3845.

Later, when Canterino asked Vastola whether he felt that LaMonte was a "controllable guy," Vastola assured him. "It's gone, it's gone."

On October 3, 1985, Vastola told Fisher that LaMonte and his family had disappeared. He had "people knockin' on his windows" but they had seen no sign of the LaMontes.

III. DISCUSSION

A. GOVERNMENTS APPEAL

1. Jurisdiction

The threshold question with respect to the government's appeal is jurisdictional, as Vastola has moved to

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(Continued from previous page)

conspiracy in connection with the MCA deal. The district court granted Fisher's motion for judgment of acquittal but sustained Canterino's and Levy's convictions. *United States v. Levy*, 694 F. Supp. 1136 (D.N.J. 1988). This court affirmed by judgment order dated December 6, 1989.

dismiss the appeal because of the government's failure to file its notice of appeal within thirty days of the district court's order granting Vastola's motion for judgment of acquittal on Count 1.[9] *See* Fed. R. App. P. 4(b).[10]

On April 28, 1989, the district court orally announced its decision on Vastola's motion and entered its order granting it that same day. Apparently, there was some confusion in the United States Attorney's office and within the district court's chambers as to whether the order actually was entered on April 28, 1989, because, following inquiries made by Assistant United States Attorney Repetto, the district court on May 30, 1989, issued a second order, entered on June 1, 1989, granting the judgment of acquittal. The government's notice of appeal, filed on June 12, 1989, recited that the government was appealing from the order entered on June 1, 1989.

As Vastola correctly points out in his motion to dismiss, the timeliness of the government's notice of appeal must be determined either from the date of the April 28,

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[9] The parties agree that we have jurisdiction over Vastola's and Saka's appeals under 28 U.S.C. § 1291 and that, apart from the dispute regarding the timeliness of the government's notice of appeal, we have jurisdiction over the government's appeal under 18 U.S.C. § 3731 and 28 U.S.C. § 1291.

[10] Rule 4(b) provides:

> When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after entry of (i) the judgment or order appealed from or (ii) a notice of appeal by any defendant.

Fed. R. App. P. 4(b).

1989, order or the date of Saka's notice of appeal, as that was the last notice of appeal filed by "any defendant." Rule 4(b)(ii). The district court's entry of the second order on June 1, 1989, could not, in itself, extend the time for the filing of the notice of appeal because the order entered on April 28, 1989, was not vacated by that order, or insofar as we are aware, by any other order. As Saka's notice of appeal was filed on May 8, 1989, the latest the government could have timely filed its notice of appeal was June 7, 1989. Therefore, barring any time extensions, the government's notice of appeal was filed five days late.

However, by letter dated October 18, 1989, the government moved for a postponement of this court's decision on the motion to dismiss, as the government was seeking an extension of time of the notice period from the district court pursuant to Rule 4(b). The postponement was allowed and the district court initially denied the government's motion by order dated November 13, 1989, but, pursuant to the government's motion for reconsideration, by order dated December 5, 1989, granted the extension of time on the ground of excusable neglect.

The issue before us is whether the district court retained subject matter jurisdiction to grant a time extension for the government's filing of a notice of appeal. We conclude that it did and therefore deny the motion to dismiss the government's appeal.

An appellate court cannot enlarge the time for an appeal because the absence of timely notice deprives it of subject matter jurisdiction. *United States v. Robinson*, 361 U.S. 220, 224, 80 S.Ct. 282, 285 (1960); *United States v.*

Grana, 864 F.2d 312, 314 (3d Cir. 1989); *Braden v. University of Pittsburgh*, 552 F.2d 948, 950-51 (3d Cir. 1977). However, in limited circumstances, the district court can extend the period for filing of a notice of appeal. Fed. R. App. P. 4(b) provides that:

> Upon a showing of excusable neglect the district court may, *before or after the time has expired*, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. [Emphasis supplied.]

Several courts of appeals have construed this provision to mean that, in criminal cases, a notice of appeal filed within thirty days after the expiration of the filing period functions as a request for an extension of time, which may be granted retroactively by the district court after the expiration of the thirty day extension period. *See e.g., United States v. Rothseiden*, 680 F.2d 96, 98 (11th Cir. 1982) ("The practice under FRAP 4(b) is that if the untimely notice of appeal is filed within the extended 30-day period, then we will consider the filing as a motion made to the district court for extension of time for excusable neglect."). *See also United States v. Kaden*, 819 F.2d 813, 817 (7th Cir. 1987); *United States v. Golding*, 739 F.2d 183 (5th Cir. 1984).

We have yet to adopt this construction of Rule 4(b) followed by our colleagues on the Courts of Appeals for the Fifth, Seventh and Eleventh Circuits. *But see United States v. McKnight*, 593 F.2d 230, 233 (3d Cir. 1979) (dismissing appeal without prejudice where notice of appeal was untimely under Rule 4(a) but was filed before the expiration of the thirty day time period for a finding of

excusable neglect because the court of appeals lacked the power to remand the matter to the district court). Vastola has interpreted our decision in *United States v. Grana*, 864 F.2d at 312, to mean that we have expressly rejected the proposition that a district court retains the power to grant a time extension under Rule 4(b) after the expiration of extended thirty day filing period. However, *Grana* is inapposite to the situation here, as our decision in that case did not hinge on our construction of the time extension provision in Rule 4(b).

In *Grana*, the appellant, an inmate at a federal prison, filed a notice of appeal from a final order entered April 18, 1988, on May 13, 1988, fifteen days after the appeal period expired. 864 F.2d at 314. The appellant claimed that he had not received the district court's order until May 5, 1988, due to negligence on the part of prison personnel. *Id.* Relying on *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379 (1988), wherein the Supreme Court held that the timeliness of a *pro se* inmate's notice of appeal must be judged from time of its delivery to prison authorities rather than from the time of its filing, we held that the notice of appeal was timely if filed within ten days of the inmate's receipt of the district court's final order. *Id.* at 316. We reasoned that prison delays in transmitting a final order to an inmate are just as destructive of inmate's rights as are delays in filing his papers in court. *Id.* Accordingly, we remanded to the district court for a factual finding as to the date the inmate received the order. The decision in *Grana* thus rested on very different principles than *Kaden*, *Rothseiden*, and *Golding*.[11]

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[11] In fact, in *Grana*, we expressly stated that we were not relying on the extension provisions of Rule 4(b). The inmate in

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Vastola also argues that the construction of Rule 4(b) urged by the government indefinitely continues the district court's jurisdiction to rehabilitate untimely notices of appeal. We reject this argument, as Rule 4(b) contains an inherent limitation on the district court's ability to grant a time extension. Although on its face, Rule 4(b) confers indefinite jurisdiction on the district court to grant a time extension, if no notice of appeal has been filed within the thirty day extension period, then the district court's order would have no force or effect, as the court can only extend the filing period for thirty days. The key question under Rule 4(b) is when the notice of appeal was filed, not when the time extension was granted.[12]

We have no doubt that the courts in *Kaden*, *Rothseiden*, and *Golding* were correct in recognizing the power of a district court to grant a time extension in a criminal case after the expiration of the extended notice period, as their construction of Rule 4(b) is consistent

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Grana, in seeking to obtain immediate appellate review, pointed out that as of May 5, 1988, when he received notice of the final order, he still could have filed a motion for a time extension under Rule 4(b). *Id.* at 314 n.6. We declined to rely on the "procedural avenues for attaining appellate review" by extension of the time to appeal provided in Rule 4(b) because they are "subject to district court discretion and therefore do not compensate for the right to appeal which is lost due to prison delay." *Id.*

[12] Vastola's final argument, that the so-called "legal fiction" proposed by the government should apply only to appeals by defendants, does not require extensive discussion, as it is contrary to the literal language of Rule 4(b), which treats appeals by defendants and the government equally.

with its literal language, which authorizes a district court to make a finding of excusable neglect "before or after the time has expired." In view of the district court's unchallenged finding of excusable neglect, we conclude that the government's notice of appeal filed June 12, 1989, from the order of April 28, 1989, was timely within the thirty day extension period. Accordingly, we deny Vastola's motion to dismiss the government's appeal.

2. Inconsistency of the Verdict on Count 1

The district court granted Vastola's motion for judgment of acquittal with regard to Count 1 of the superseding indictment, which charged him with conducting an enterprise through a pattern of racketeering in violation of RICO, 18 U.S.C. § 1962(c). Count 1 alleged four predicate acts of racketeering, each of which was defined through reference to various substantive offenses charged in separate counts of the indictment. The first racketeering act was Vastola's participation in a conspiracy to use and use of extortionate means to collect the extension of credit to John Lamonte in connection with the MCA deal, as charged in Counts 4, 5, 9, and 10. The second was Vastola's involvement in a conspiracy to make extortionate loans and to use extortionate means to collect them, as charged in Counts 6 and 7. The third racketeering act concerned a particular extortionate loan to Daniel Zack, as charged in Count 11. And the fourth was his fraudulent concealment and transfer of property of Dispodype, Inc., a company controlled by Saka, in violation of the bankruptcy laws, as charged in Counts 24 and 26. Although the jury either deadlocked or acquitted Vastola of all offenses underlying the four racketeering acts

except for those charged in Counts 4 and 9, it found him guilty of the RICO charge.

The district court granted Vastola's motion for judgment of acquittal, reasoning that the jury could not possibly have found a "pattern of racketeering activity" as required by section 1962(c), given that it found Vastola guilty on only one of the four predicate racketeering acts. According to the judge, the conviction on the RICO count was not simply a problem of inconsistency in the jury verdict. Rather, he decided that an essential element of the section 1962(c) offense was lacking, as that statute requires the government to prove at least two predicate acts of racketeering. We now reverse.

There is no question that the jury verdict was inconsistent. By its plain language, section 1962(c) requires the government to show a "pattern of racketeering activity," which, under section 1961(5), must be based on proof of "at least two acts of racketeering activity."[13] The jury's

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[13] Of course, bare proof of two racketeering acts is not sufficient to prove a "pattern" under the RICO statute. As this court explained in *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1989), the "crucial requirement to establish a pattern is 'continuity plus relationship . . . combin[ing] to produce a pattern,' " *Id.* at 364 (quoting *Sedima v. S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14, 105 S.Ct. 3275, 3285 n.14 (1985)). Thus, the predicate acts must be related in " 'purpose, results, participants, victims, or methods of commission . . . so as not to be isolated events.' " *Id.* (citations omitted).

There is no allegation in this case, however, that the predicate acts charged in the indictment, if proven would be insufficient to show a "pattern" under section 1961(5). Indeed, the first three acts would clearly constitute a pattern as they all involve extortionate activities.

acquittal or deadlock on the offenses underlying three of the four alleged racketeering acts was incompatible with its conviction on the RICO count. However, as the problem is purely one of inconsistency in the verdict, it is controlled by *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471 (1984).

In *Powell*, the defendant was acquitted of charges of conspiracy to possess and possession of cocaine with intent to distribute, but was convicted under 21 U.S.C. § 843(b) of using a telephone to facilitate the commission of the conspiracy and possession offenses. *Id.* at 59-60, 105 S.Ct. at 474. The Court of Appeals for the Ninth Circuit upheld the district court's grant of judgment of acquittal on the section 843(v) conviction, reasoning that an acquittal on the predicate felony, that is, the conspiracy, logically precluded a conviction on the compound felony of using a telephone to facilitate the conspiracy.

In a unanimous decision, the Supreme Court reversed, reaffirming its holding in *Dunn v. United States*, 284 U.S. 390, 52 S.Ct. 189 (1932)[14] that jury verdicts in

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[14] In *Dunn*, the defendant was convicted on maintaining a common law nuisance by keeping intoxicating liquor on his premises but was acquitted on charges of unlawful possession and sale of the liquor. The Court rejected the defendant's claim that the conviction should be set aside because of its inconsistency with the acquittals, reasoning that the defendant's argument unjustifiably assumed that acquittals were somehow more reliable than the conviction:

> 'The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions,

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criminal cases cannot be set solely on the ground of inconsistency. As the Court explained the *Dunn rule applied with equal force to the facts in Powell* because it was impossible to tell whether the inconsistency favored the defendant or the government: "It is unclear whose ox has been gored." *Id.* at 65, 105 S.Ct. at 477. While it was possible that the jury did not find sufficient evidence to convict on the predicate offenses and misapplied the law on the compound offense, the converse was equally possible, namely that it was acquittals which were suspect. Given that the defendant's protection against double jeopardy precluded the government from seeking appellate review of the acquittals, the rule against overturning the conviction because of the inconsistency did "not necessarily . . . [create] a windfall to the Government at the defendant's expense." *Id.* at 65, 105 S.Ct. at 476. Conceivably, it was the defendant who enjoyed a windfall due to the jury's lenity.

The Court specifically rejected the defendant's argument that inconsistent verdicts in the compound felony context warrant an exception to the *Dunn* rule. The defendant maintained that an acquittal on the predicate offenses underlying a compound felony conviction necessarily means that there was insufficient evidence to prove the compound felony. *Id.* at 68, 105 S.Ct. at 478.

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> but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumptions of power which they had no right to exercise, but to which they were disposed through lenity.'

Id. at 393, 52 S.Ct. at 190.

According to the Court, the defendant's argument showed a

> misunderstand[ing of] the nature of the inconsistent verdict problem. Whether presented as an insufficient evidence argument, or as an argument that the acquittal on the predicate offense should collaterally estop the Government on the compound offense, the argument necessarily assumes that the acquittal on the predicate offense was proper-the one that the jury 'really meant.' This, of course, is not necessarily correct; all we know is that the verdicts are inconsistent.

Id.

As this case virtually indistinguishable from *Powell*, we conclude that the inconsistent verdicts did not justify the district court's grant of judgment of acquittal. The jury was properly instructed that the government had to prove beyond a reasonable doubt *each* of the five essential elements of section 1962(c), including the defendant's participation in a "pattern of racketeering." Specifically with regard to the "pattern of racketeering" requirement, the district court made it clear that two predicate racketeering acts were required and that a guilty verdict on two substantive offenses would not be sufficient to establish a "pattern" if those offenses formed part of the same racketeering act described in Count 1 of the indictment:

> Paragraph 4 of Count 1 charges that defendant Gaetano Vastola committed 4 acts of racketeering. . . . You will find that a number of individual Racketeering Acts (Racketeering Act 1, 2 [and] 4 . . .) are comprised of more than one count, thus a particular defendant is charged with more than one offense within the Racketeering Act. This is perfectly proper. However,

> I instruct you *in order to satisfy that Racketeering Act you must unanimously agree that the defendant . . . committed at least one of the offenses presented before you can find him guilty of that Racketeering Act.* Of course you may find that the defendant committed more than one of the offenses but a least one is essential and the finding must be unanimous. *The Government must prove beyond a reasonable doubt that each defendant committed, or knowingly and willfully aided or abetted in the commission of, at least two of the racketeering acts with which he is charged.*

Appendix at 2746 (emphasis supplied).

As the jury was properly instructed as to the RICO charge, we would be no more justified in holding that the jury disregarded those instructions than we would be in speculating that the jury disregarded the weight of the evidence when acquitting Vastola of the predicate offenses.

Notwithstanding the clarity of the jury charge, Vastola argues that a note sent out by the jury during its deliberations indicates that it was confused as to the difference between a "racketerring act" and the various offenses making up each of the four alleged acts. In its note, the jury wrote:

> We would like a legal instruction regarding the RICO counts. To some extent, all three RICO counts are discussed together in the same charge. We are not completely sure whether or not the 'two acts of racketeering activity' requirement applies to all three RICO counts or just to count 1. In other words, if we found one defendant not guilty of other *racketeering counts* (4-16, 18, 19, 21, 22, 24, 25 and 26) could we still find that defendant guilty on count 2 or count 3?

Appendix at 2885 (emphasis supplied).

According to Vastola, the jury's reference to "racketeering counts" indicates that "the jury considered *each* of the enumerated counts to be racketeering acts, despite the fact that County One encompassed only four racketeering acts." Thus, Vastola asserts, this case is unlike *Powell* because the court can rationally infer that the apparent inconsistency in the verdict was not a product of lenity but was attributable to the jury's erroneous belief that Vastola's guilt on counts 4 and 9 satisfied the two predicate act requirement for the section 1962(c) offense.

Although Vastola's interpretation of the note is plausible, it is not conclusive. It is equally possible that, by "racketeering counts," the jury meant to refer to the offenses subsumed in each of the four racketeering acts charged in Count 1. The note simply is too ambiguous to justify our speculation into the jury's thought processes. They only clear conclusion that can be drawn from the note is that the jury fully understood that it needed to find two predicate racketeering acts to convict under Count 1.

Vastola further suggests that, in the RICO context, acquittals on separately charged predicate offenses render a RICO conviction inherently suspect because, to assess guilt under the RICO statute, the jury first has to determine whether the defendant committed the individual offenses subsumed in the RICO charge.[15] In other

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[15] Vastola buttresses his argument by pointing to the following jury instruction:

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words, the predicate acts are "building blocks" which make up the pattern of racketeering activity, without which the jury could not make an intelligible decision as to the RICO charge. Accordingly, Vastola suggests, the problem here is not merely one of inconsistency in the jury verdict. Rather, the acquittals on the non-RICO counts indicate that the jury failed to find an essential

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> 2. *Consequences of Other Verdict*
> All of the racketeering acts charged in paragraph 4 of Count 1 relate to all but five of the Counts 4 through 26 of this indictment. If you find a defendant not guilty of one of those specific counts, you may not consider that count as one of the two racketeering acts required under Count 1.

Appendix at 2746.

Vastola argues that, under this instruction, the jury was required to consider the predicate acts before passing judgment on the RICO charge.

This argument is precluded by unequivocal language in *Powell* which negates the proposition that jury instructions regarding the interdependency of charges have any bearing on the inconsistent verdict problem:

> [The] problem is not altered when the trial court instructs the jury that it must find the defendant guilty of the predicate offense to convict on the substantive offense. Although such an instruction might indicate that the counts are no longer independent, if inconsistent verdicts are nevertheless reached those verdicts still are likely to be the result of mistake, or lenity, and therefore are subject to the *Dunn* rationale.

469 U.S. at 68, 105 S.Ct. at 478-79.

element of the RICO offense, namely, the pattern of racketeering activity.

We find this argument unpersuasive as it rests upon a fallacious assumption that the acquittals on the predicate acts can be treated as the functional equivalent of a special verdict on the RICO offense. While in some cases, we have inferred from acquittals on particular predicate offenses that the offenses were not the basis for the jury's general verdict of guilt on a RICO offense, *United States v. Riccobene*, 709 F.2d 214, 229 (3d Cir.), *cert. denied*, 464 U.S. 849, 104 S.Ct. 157 (1983), we have only done so where the only other possible conclusion would be that the jury returned inconsistent verdicts. That is, we will not assume an inconsistent verdict where an alternative explanation is present, namely, that the jury relied on alternative predicate acts when convicting on the RICO charge. Where, as here, the jury acquits on all but one of the separately charged predicate acts, we have no choice to conclude that the verdicts are inconsistent.[16] As such, the case is controlled by *Powell*.

Indeed, we point out that the situation here is virtually identical to the one in *Powell*. The offenses subject

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[16] Interestingly, this case demonstrates application of both the *Riccobene* and the *Powell* principles. As we will later discuss, under *Riccobene*, we can infer from the jury's special interrogatory on Count 2 the basis for its general verdict of guilt on Count 3, which charged Vastola with conspiring to conduct the affairs of the enterprise through the collection of unlawful debt. To reach any other conclusion, we would have to assume an inconsistency between the verdicts on Count 2 and 3, as they both relied on the same predicate acts.

to the inconsistent verdict in *Powell* also were interdependent, as the jury could not rationally find guilt on the section 843(b) offense without reaching some conclusion as to the defendant's involvement in the conspiracy. As in *Powell,* we have no way of knowing whether the jury convicted on the RICO count because if was convinced of Vastola's guilt on the predicate acts, yet, at the eleventh hour, acquitted him of those acts out of lenity or some other improper motivation. In view of the nature of the inconsistency in *Powell,* Vastola's attempt to distinguish that case must fail.

Finally, we note that other appellate courts have applied *Powell* in a RICO context. *See e.g. United States v. Tinsley,* 800 F.2d 448, 450-52 (4th Cir. 1986); *United States v. Neapolitan,* 791 F.2d 489, 505 (7th Cir.), *cert. denied,* 479 U.S. 940, 107 S.Ct. 422 (1986). *Cf. United States v. Chang An-Lo,* 851 F.2d 547, 560 (2d Cir.), *cert. denied,* ___ U.S. ___ 109 S.Ct. 493 (1988) (even assuming that conviction on predicate conspiracy was inconsistent with acquittal on RICO charge, reversal was not possible). We agree with our colleagues on the Courts of Appeals for the Second, Fourth, and Seventh Circuits that there is no legitimate basis for grafting an exception to *Powell* for RICO offenses.

We express no opinion as to whether the evidence of Vastola's participation in the predicate acts was sufficient to support his RICO conviction, as the sole basis for the grant of judgment of acquittal was the district court's erroneous conclusion that *Powell* did not apply to inconsistent verdicts in the RICO context. As the government acknowledged at oral argument, Vastola is free to appeal directly from the judgment of conviction and sentence on

Count 1 after its reinstatement by the district court. Of course, if he chooses to do so, he will be barred from rearguing any issues which were decided against him in this appeal. However, we do not decide any questions concerning the sufficiency of the evidence on Count 1 as they are not squarely before us at this time.[17]

In view of the foregoing, we will reverse the district court's grant of judgment of acquittal for Vastola on Count 1 and remand for reinstatement of the conviction and sentencing, without prejudice as to any other issues except those decided on this appeal pertaining to his conviction on that count.

B. SUFFICIENCY OF THE EVIDENCE ON COUNT 2

Vastola maintains that there was insufficient evidence to support his conviction under section 1962(c) for conducting a criminal enterprise through the collection of unlawful debt, as charged in Court 2. The jury indicated

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[17] It might be argued that Vastola's challenge to the sufficiency of the evidence to support his RICO conspiracy conviction under Count 3 has placed in issue the sufficiency of the evidence with respect to Court 1, as the offense charged in Count 3 rested, in part, on the same pattern of racketeering activity charged in Count 1. However, in our review of Vastola's arguments raised with respect to Court 3, we have found it unnecessary to examine in detail the evidence regarding the pattern of racketeering activity, as we have determined that his RICO conspiracy conviction must stand on the basis of his involvement in the collection of an unlawful debt from Joseph Dwek. Furthermore, in our view, Vastola has not had a full and fair opportunity to frame the issues as they relate specifically to Count 1.

in a special interrogatory that the sole predicate act on which it based its verdict with regard to Vastola was his participation in the unlawful debt collection from Joseph Dwek. On appeal, Vastola does not challenge the sufficiency of the evidence to support the jury's finding of a criminal enterprise but has limited his argument to the circumstances surrounding the Dwek loan.

As an appellate court, we may not disturb a jury's factual findings if they are reasonably based on the record developed at trial. We must uphold the verdict if "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt." *Burks v. United States*, 437 U.S. 1, 16, 98 S.Ct. 2141, 2150 (1978); *United States v. Leon*, 739 F.2d 885, 890 (3d Cir. 1984). Furthermore, as recently reaffirmed in *United States v. Sandini*, 888 F.2d 300 (3d Cir. 1989), the evidence " 'does not have to be inconsistent with every conclusion save that of guilt if it does establish a case from which a jury can find the defendant guilty beyond a reasonable doubt.' " *Id.* at 311 (quoting *United States v. Cooper*, 567 F.2d 252, 254 (3d Cir. 1977)). Vastola thus bears a heavy burden in convincing this court that the evidence was insufficient on Count 2. We believe that he has carried it.

To prove a RICO violation predicated upon a collection of unlawful debt, the government had to show that Vastola participated in the enterprise through the collection or attempted collection of a debt which was usurious

under state or federal law.[18] 18 U.S.C. § 1961(6)(A) (defining an "unlawful debt"). *See United States v. Pepe*, 747 F.2d 632, 674 (11th Cir. 1984) (upholding RICO convictions predicated upon attempted collection of unlawful debt). Here, there is no dispute that the loan to Dwek was usurious under New Jersey law, as the weekly interest charged on the loan corresponded to an annual interest rate of 130%. *See* N.J. Stat. Ann. § 2C:21-19 (West Supp. 1989). Vastola argues, however, that there was legally insufficient evidence linking him to the loan.

Although the evidence was overwhelming that Vastola supervised the collection of unlawful debts by his subordinates within the enterprise,[19] the evidence

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[18] It is noteworthy that section 1962(c) does not require proof of extortionate activity to establish a RICO violation predicated upon the "collection of unlawful debt." In this regard, the "unlawful debt" prong of section 1962(c) may be contrasted to the "pattern of racketeering" prong. If the government seeks to prove a RICO offense predicated upon a pattern of racketeering acts, it is confined to charging the predicate offenses included in section 1961(1). Of these offenses, the only ones which might arise out of the same transaction as a usurious loan are those chargeable under section 1961(1)(A), which brings within the purview of section 1962(c) "act[s] or threat[s] involving . . . extortion . . . chargeable under State law," and indictable offenses under 18 U.S.C. §§ 891-94 (relating to extorionate credit transactions) and under section 1951, the Hobbs Act. *See* section 1961(1)(B). All of the above offenses require a showing of extorionate activity.

[19] In a conversation on July 19, 1985, Jerry Gabonelli called Saka to inquire about the status of $5000 advance he had requested on a $20,000 loan. Saka explained that Vastola was out of town and that no money could be advanced until Vastola gave his approval:

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establishing Vastola's involvement in the Dwek affair was sparse. The government places heavy reliance on three tape-recorded conversations, the April 22, 1985, conversation in which Saka stated to Brocco, "I never squared you with Tommy," the April 26, 1985, conversation between Vastola, Saka, and Brocco in which Vastola urged Saka to take "a piece" of Dwek's settlement, and the July 3, 1985, conversation between Saka and the unknown male who the prosecutor, in his summation, claimed was Vastola.

Although the words, "I never squared you with Tommy" appear in the transcript, Vastola strenuously denies that the works are on the tape. The government in its brief never directly asserts that the words are on the tape but argues only that this court is bound to accept what it believes was the jury's factual finding that the words appear on the tape because Vastola's failure to object to the transcript at trial precludes him from challenging its accuracy in this appeal. We find it unnecessary to become embroiled in the parties' dispute over the accuracy of the transcript because, even if the transcript is accurate, the statement attributed to Saka would provide only tenuous support for a finding that

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SAKA: . . . Now if Tommy okays it you can have it. You know, as soon as he gets back, no problem.

GABONELLI: There is no possibility of me gettin'it, ah, today.

SAKA: No, because he's not here.

Appendix at 35-49-50.

Vastola supervised Saka's and Brocco's collection of the debt from Dwek.[20]

The second portion of the transcript cited by the government is Saka's conversation with the "unknown male" in which the unknown male, referring to Dwek, asked, " . . . we gonna pay him five hundred a week?" This statement provides no support whatsoever for the government's case. Given Saka's references to "go[ing] fifty fifty with Dwek" and to Dwek's prospective salary, it seems clear that the parties to the conversation were discussing Dwek's partnership with Saka on the Jou Jou deal rather than the debt. Therefore, even if the unknown male was Vastola, which is not beyond dispute, the conversation has no bearing on Vastola's guilt with respect to Count 2.

The only hard evidence linking Vastola to the Dwek loan is Vastola's conversation with Saka and Brocco on April 26, 1985, in which he urged them to "[t]ake a piece" of Dwek's settlement with Cham Clothing presumably to collect the unlawful debt. He further stated: "Tell him, he's gotta put somethin' on the side. After all you came here for backup, you had the backup if there had been a problem. . . . So now you settled." Arguably, this evidence, coupled with evidence of Vastola's involvement in

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[20] It is of course true that Vastola's failure to object to the transcript at trial would have no bearing on our evaluation of the sufficiency of the evidence against him, because the transcript is not evidence. If the words do not appear on the tape, then a rational jury could not rely on them as evidence of Vastola's guilt.

other loans, could be interpreted to mean that Vastola instructed Saka on how to proceed in collecting the debt. Also, it might be construed to mean that Vastola had authorized use of the criminal enterprise's resources, that is, the "backup," in the collection process.

However, the inferences which we might draw from these remakes are highly speculative. We further note that according to Dwek's own testimony, he recognized Vastola but had no direct dealings with him. Although we appreciate the fact that Vastola's lack of contact with Dwek is not dispositive, as the government's theory was that Vastola supervised the collection activities of Saka and Brocco, the remarks highlighted by the government do not establish that Vastola played a supervisory role in the transaction. Thus, even when viewed in a light most favorable to the government, the evidence is not legally sufficient to establish that Vastola collected or attempted to collect an unlawful debt from Dwek. In view of the paucity of the evidence against him, we must reverse Vastola's conviction on Count 2 and direct his acquittal on that count.

C. THE RICO CONSPIRACY

In Count 3, the indictment charged Vastola and Saka with an agreement to conduct the affairs of the enterprise through a pattern of racketeering activity, as defined in Count 1, and through a collection of various unlawful debts enumerated in Count 2, in violation of section 1962(d). The jury indicated in a special interrogatory on Count 3 that it had based its verdict on both a pattern of racketeering activity and on the collection of unlawful

debt. On appeal, Vastola argues that his RICO conspiracy conviction must be set aside because the district court misinstructed the jury as to the pattern of racketeering requirement and because the evidence was legally insufficient to prove that he committed the predicate acts, under either of the government's theories.

The government argues that even if the evidence concerning the Dwek loan was insufficient to support Vastola's conviction on Count 2, it was sufficient to support his RICO conspiracy conviction under Count 3. Vastola, in turn, argues that even if the evidence proved his guilt of the Dwek collection, that alone could not sustain his RICO conspiracy conviction. He asserts that because the special interrogatory on Count 3 did not indicate which unlawful debt collection the jury relied upon in reaching its verdict, the court must find that the evidence was sufficient with respect to each alleged act. Thus, the threshold question before us is whether we can extrapolate from the jury's special interrogatory on Count 2 the basis for its verdict on Count 3. There is not question that we can.

It is true that a RICO conviction predicated upon multiple racketeering acts cannot stand where the evidence of any one of the underlying acts is legally insufficient and the court is unable to determine which act formed the basis for the conviction. *United States v. Brown*, 583 F.2d 659, 669 (3d Cir. 1978), *cert. denied*, 440 U.S. 909, 99 S.Ct. 1217 (1979). However, in *United States v. Riccobene*, 709 F.2d at 228, we held that there is no *Brown* problem when "the reviewing court can determine that the jury did not rely on the challenge predicated offense when reaching its verdict on the RICO charge."

Riccobene completely defeats Vastola's argument that the Dwek debt alone would be insufficient, as its facts are strikingly similar to the situation here. In that case, the defendant was acquitted of a gambling offense identified as one of several predicate racketeering acts supporting his RICO conspiracy conviction. Relying on *Brown*, he argued that his RICO conviction had to be reversed because the jury had delivered a general verdict which may have been based on the same evidence it discounted when acquitting him of the gambling charge. 709 F.2d at 229. In rejecting this argument, we explained that, to apply *Brown*, we would have to assume that the jury returned inconsistent verdicts on the two charges. *Id.* at 230. Rather than assuming that the jury acted irrationally, we decided that the acquittal "serve[d] a function analogous to a special interrogatory" and therefore, it precluded application of *Brown*. *Id.* at 229.

As in *Riccobene*, we would gave to infer inconsistent verdicts to look beyond the Dwek debt and therefore, if Vastola's RICO conspiracy conviction stands on the government's collection of unlawful debt theory, it must stand on the basis of the Dwek debt.[21] Although the evidence is insufficient to support Vastola's conviction of the substantive RICO offense charged in Count 2, that does not preclude a finding that he conspired to commit the offense.

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[21] The government need prove only predicate act to sustain a RICO conviction based on a collection of unlawful debt. *Cf. United States v. Pepe*, 747 F.2d at 673 (sustaining RICO conviction based on attempted collection of a single unlawful debt).

To prove a violation of section 1962(d), the government had to show that Vastola agreed to participate in the affairs of the enterprise through a collection of unlawful debt from Dwek. Mere assent to the commission of the predicate offense would be insufficient. 709 F.2d at 224. As explained in *Riccobene*, section 1962(d) criminalizes

> an agreement to 'conduct or participate . . . in the conduct of [an] enterprise's activities' through the commission of predicate offenses . . . , not an agreement to commit a pattern of racketeering activity alone.

709 F.2d at 224.

Thus, assuming proof of Vastola's agreement to the collection of the unlawful debt, that would only support his RICO conspiracy conviction if the collection offense was committed under the auspices of the enterprise. However, under *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.), *cert. denied*, 474 U.S. 971, 106 S.Ct. 336 (1985), Vastola did not have to agree to commit personally the predicate act to be guilty of a RICO conspiracy; it would be sufficient if he agreed to Saka's collection of the unlawful debt. *Id.*

Ironically, the most compelling evidence trying the Dwek loan to the enterprise is Vastola's own statement to Saka and Brocco that they were entitled to take "a piece" of Dwek's settlement because they "came *here* for backup." App. at 3386 (emphasis supplied). Although there is no evidence that the original extension of credit was funded by the enterprise, a jury reasonably could infer from Vastola's comment that the collection effort was one of the enterprise's unlawful endeavors. The fact that these remarks occurred in the context of what

appears to be general discussion about the status of various loans provides further support for an inference that the Dwek debt was tied to the enterprise.[22]

Although none of the statements attributed to Vastola indicates that he knew the details of the loan, a conspiracy conviction does not require proof that the defendant was aware of all aspects of the illegal activity. *See Riccobene*, 709 F.2d at 225. Furthermore, the government did not have to show that Vastola was a principal actor in the Dwek affair to prove his guilt on the RICO conspiracy charge. There is little question that Vastola knew the loan was unlawful and with that knowledge, encouraged Saka and Brocco to collect it. That is enough to establish Vastola's guilt on Count 3.

We conclude that a reasonable jury could find that collection of the debt from Dwek was an activity of the enterprise, rather than an independent venture on the part of Saka, and that Vastola conspired to further the enterprise through the collection. Accordingly, we affirm

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[22] Immediately preceding the discussion of the Dwek debt, the following exchange took place:

> BROCCO: Listen let's take a couple of prices like this here, see I would love to have 50,000 of them.
>
> VASTOLA: Rather take it ourselves. Take it ourselves Forget about.
>
> BROCCO: I told you, we have a situation like that you're always serious, you're always (UI).
>
> VASTOLA: Well, we need the scratch, that's all.
>
> Appendix at 3384.

Vastola's conviction under section 1962(d) on the basis of the government's collection of unlawful debt theory.[23]

D. SUFFICIENCY OF THE EVIDENCE OF MCA EXTORTION

The evidence is overwhelming that Vastola conspired to use extortionate means to collect LaMonte's debt arising from the MCA deal, as charged in Counts 4 and 9. Indeed, these were the only non-RICO charges of which Vastola was convicted. Pointing to numerous intercepted conversations in which he was berated by Levy for failing to secure payment of the debt, Vastola argues that he was aligned with LaMonte as a buyer in the transaction. Although the relationship between Levy and Vastola clearly was not harmonious throughout the deal, it was Vastola himself who repeatedly insisted to Levy that he was an equal partner with Levy and Pisello in the deal. He cannot complain now that the jury recognized him as such.

Further, Vastola's contention that he enjoyed friendly relations with LaMonte is belied by his repeated assertions to his co-conspirators that LaMonte's continued physical well-being hinged on his speedy repayment of the extension of credit. While Vastola argues on appeal that his comments stemmed from his understandable frustration at LaMonte's irresponsible behavior, it was

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[23] In view of our decision with respect to the Dwek debt, we do not reach Vastola's challenge to the jury instructions on the pattern of racketeering requirement.

hardly unreasonable for the jury to draw a different inference, especially in view of evidence that Vastola punched LaMonte in the nose. Finally, the agreement to use extortionate means to collect the debt can be readily inferred from Vastola's remarks at the September 23 meeting concerned the seizure of LaMonte's business.

In short, we have no difficulty concluding that Vastola's convictions under 18 U.S.C. §§ 894 and 1951, as charged in counts 4 and 9, are supported by substantial evidence, as the evidence shows that he was so involved in the MCA extortionate collection conspiracy.

E. NAMING OF THE RICO ENTERPRISE

Count 1 of the superseding indictment, which described the RICO enterprise, repeatedly referred to it as the "Vastola Organization." Also, in the course of his closing statement, the prosecutor identified the enterprise as the Vastola Organization.[24] The government, however,

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[24] In his summation, the prosecutor stated that:

> Vastola Organization, you haven't heard that in this case. You've only heard it when the indictment is described. You can't point to a group of people walking down the street and say, hey, man, there goes the Vastola Organization. There is no place that you can call where you say can I speak to the Vastola Organization. Nor do any of the participants refer to themselves as members of the organization. This is an organization that doesn't want to be known. It basically operates in secret.

Appendix at 2403.

(Continued on following page)

adduced no evidence that the RICO enterprise was denominated the "Vastola Organization" by its members or by any other persons.

Vastola's trial attorney objected to the government's use of the term, the "Vastola Organization," on at least two occasions, on February 8, 1989, following the charging conference and immediately following the court's charge to the jury. There is no indication that a contemporaneous objection was made to the closing summation. By letter memorandum to the district court following the charging conference, at which Vastola's attorney unsuccessfully moved to have the label be stricken from the indictment, the attorney wrote:

> We have asked that the Court strike from the indictment the highly prejudicial labeling of the alleged enterprise as 'the Vastola organization.' If, however, references to the 'Vastola organization' are not redacted from the indictment, we request that the jury be instructed . . . that they must 'take special care in considering the RICO charges not to be influenced by the government's *charge* that the alleged organization is the so-called 'Vastola organization. . . . '

App. at 2661 (emphasis in original).

This request was denied. Following the jury charge but before the jury retired, the attorney renewed his request

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The prosecutor also referred to the "V stola Organization" in his opening statement. However, we will not set forth his comments herein because Vastola concedes that they were proper, as the prosecutor was entitled to attempt to prove the existence of an enterprise called the "Vastola Organization."

which again was denied by the district court on the ground that the jury already had been instructed that charges in an indictment do not constitute evidence. Members of the jury were given copies of the superseding indictment for use during their deliberations.

On appeal, Vastola argues that the district court abused its discretion in refusing to either redact the indictment or give the requested instruction and, as a result, he suffered manifest prejudice, particularly with regard to the RICO counts, which deprived him of a fair trial. The government in turn argues that the court had no power to redact the indictment and, in any event, the general instruction regarding the indictment's function as a charging instrument was sufficient to inform the jury that the label, the "Vastola Organization," was not evidence of Vastola's guilt. As explained below, we believe that Vastola has raised some very legitimate concerns. However, on the facts of this case, we find that there was no prejudice flowing from the denomination of the enterprise and therefore we shall not disturb Vastola's conviction of this ground.

As a threshold matter, if Vastola has a claim of unfair prejudice, it must be based solely on the language of the superseding indictment because his trial counsel failed to object to the prosecutor's use of the term in his closing statement. Absent a contemporaneous objection, the district court's failure to mitigate the prejudicial impact of the prosecutor's remarks must be evaluated under the plain error rule. *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 1046 (1985); *United States v. Sandini*, 888 F.2d at 308-09. Under the plain error rule, the prosecutor's allegedly improper references to the Vastola Organization

would serve as a basis for reversal only if, considering the "totality of evidence against the accused," the error was serious enough to deprive Vastola of a fair trial. *Sandini*, 888 F.2d at 309.

Of course, the court has no reason to perform a plain error analysis unless the appellant has pointed to an error. In his references to the closing statement, Vastola has not claimed any error on the part of the district court. He does not claim that the court *sua sponte* should have delivered curative instructions or taken other measures to remove the taint of the prosecutor's allegedly prejudicial remarks. In fact, the remarks were not necessarily unfairly prejudicial as the prosecutor conceded the absence of any evidence that the enterprise was named the "Vastola Organization." Accordingly, as there is no claim of error with respect to the summation and no compelling evidence of prejudice, we will only consider whether the district court erred in refusing to redact the superseding indictment[25] or deliver the requested instructions.

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[25] Contrary to the government's suggestion, the district court had the power to strike references in the indictment to the "Vastola Organization." Numerous decisions have specifically recognized the power of the district court to redact from an indictment charges which the government has resolved not to prosecute. *United States v. Zauber*, 857 F.2d 137, 150-51 (3d Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1340 (1989), and superfluous language which unfairly prejudices the accused. *United States v. Moya-Gomez*, 860 F.2d 706, 763 (7th Cir. 1988). *See also United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811 (1985) (deletions from an indictment do not necessarily constitute unconstitutional amendment(s). In fact, the district court in its pretrial decision, struck the preamble to the original indictment on the ground that it contained "irrelevant and vague language which may imply guilt by association or insinuate unalleged facts." 670 F. Supp. at 1255.

We are aware of no RICO cases in which the government, as part of its trial strategy, named the enterprise after one of the defendants. Several cases cited by Vastola involve situations where the enterprise was controlled by an organized crime family and was labelled by the family's surname. *See, e.g., United States v. Salerno,* 868 F.2d 524, 528 (2d Cir.), *cert. denied* ___ U.S. ___, 110 S.Ct. 56 (1989); *United States v. Daley,* 842 F.2d 1380 (2d Cir. 1988); *United States v. Scarfo,* 850 F.2d 1015 (3d Cir.), *cert. denied,* ___ U.S. ___, 109 S.Ct. 263 (1988). Vastola argues that in each of these cases, the government introduced evidence establishing the existence of a crime family bearing the name included in the indictment. *See Scarfo,* 850 F.2d at 1018 (testimony demonstrated hierarchy of control within the Scarfo crime family). However, to establish an enterprise under section 1962(c), the government would have had to introduce the type of evidence discussed in these cases, regardless of the label it affixed to the enterprise. Considering that, as members of organized crime families, the defendants in these cases hardly were in a position to complain that the enterprise shared their name, the cases simply have no bearing on the specific question before us.

The situation here is more closely analogous to cases where defendants have sought to have aliases struck from indictments or to have reference to them precluded at trial. *See, e.g., United States v. Moya-Gomez,* 860 F.2d at 762-63; *United States v. Jorge-Salon,* 734 F.2d 789, 791 (11th Cir.), *cert denied,* 469 U.S. 869, 105 S.Ct. 215 (1984); *United States v. Alfonso,* 552 F.2d 605, 618 (5th Cir.), *cert. denied,* 434 U.S. 857, 98 S.Ct. 179 (1977); *United States v. Persico,* 621 F. Supp. 842 (S.D.N.Y. 1985). In those cases, the courts

have held that the inclusion of an alias in an indictment, even one with strong negative connotations, is permissible if it is needed to connect the accused to the acts charged. *Persico*, 621 F. Supp. at 860-61. Still, as Vastola asserts, the government normally has been required to prove that the defendant was known by the alleged alias. *Id.*[26]

We recognize that in the RICO context, the government's naming of the enterprise after one of the defendants carries similar potential for prejudice as does identification of the defendant by a damaging alias. Of course, the risk of unfair prejudice is greatest where the defendant is only loosely affiliated with the enterprise. In such circumstances, the jury conceivably could infer an essential element of the RICO offense, namely, the defendant's participation in the enterprise, *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 , 496, 105 S.Ct. 3275, 3285 (1985), from unsupported language in the indictment characterizing the defendant as the enterprise's leader. In such

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[26] *Persico* involved a RICO prosecution in which several defendants objected to the inclusion in the indictment of such aliases as "Frankie the Beast" and "The Snake." *Id.* at 860-61. The district court refused to redact the indictment before trial, reasoning that the aliases might be integral to the government's case, as the government had alleged that its primary evidence consisted of wiretap evidence in which the defendants referred to each other by their aliases. *Id.* ("Even if prejudicial, . . . aliases and nicknames are proper in an indictment where they will be part of the government's proof as trial.") The court stated, however, that, upon defendants' motion, it would consider redacting the indictment at the close of the government's case if the government failed to introduce proof of the aliases. *Id.*

cases, on a defendant's motion, it might very well be appropriate for the district court to either redact the indictment or deliver a specific instruction cautioning the jury not to consider the enterprise's name as evidence of guilt. *See Moya-Gomez*, 860 F.2d at 763.

However, we do not perceive this to be such a case. While the co-conspirators did not specifically refer to the enterprise as the "Vastola Organization," the record clearly shows that Vastola was in charge. It is evident that the majority of illegal loans issued by the enterprise were subject to Vastola's approval, and that the co-conspirators understood Saka and Brocco to be Vastola's "people." In fact, Vastola himself, in a conversation with Saka and Levy about Brocco's failure to secure payment from LaMonte, stated that Brocco's behavior called into question the strength of his allegiances to the organization and to Vastola.

On this record, we cannot see how the naming of the enterprise possibly could have influenced the outcome of this case. Had the indictment read, 'Vastola's organization,' no reasonable claim of prejudice could be made, as the government did prove the existence of an organization headed by Vastola. We cannot imagine that use of the practically identical phrase, the "Vastola Organization," conveyed anything to the jury that was not already amply demonstrated by the evidence. Thus, while the district court's safest course of action may have been to issue a cautionary instruction, its refusal to do so was at most harmless error.

F. ADMISSIBILITY OF TESTIMONY REGARDING LOANSHARKING TERMS

The government called Sergeant Robert Jones, a law enforcement officer who participated in the electronic

surveillance of Video Warehouse and other locations, to identify voices on the government tapes and explain other details of the investigation. During the course of his testimony, over defense counsel's objections, he interpreted three tape-recorded statements as references to loansharking. First, he testified that Saka's statement, "I have three for you," meant that Saka had "three loan shark payments." Second, he interpreted Vastola's comment, "Everybody I okay to Rudy for money is fuckin' up cause they think they got me as a buffer. . . . " Jones explained that, given the context, "Okay meant that we okayed them to Rudolph Farone for a loanshark –," He was interrupted by an objection which was overruled. Finally, in reference to Brocco's and Vastola's remarks that they could "put it our for" two or three, Jones testified, "We could put it out for two. We could put it out for three. It's two points, two percent, terms used in loanshark loans."

The district court, relying on *United States v. Dicker*, 853 F.2d 1103 (3d Cir. 1988), and *United States v. De Peri*, 778 F.2d 963 (3d Cir. 1985), *cert. denied*, 475 U.S. 1110, 106 S.Ct. 1518 (1986), held that the above testimony was admissible under either Fed. R. Evid. 701[27] or 702.[28]. The

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[27] Rule 701 provides:

> If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue

[28] Rule 702 provides:

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court opined that Jones was qualified as an expert "in the fields relevant to this case" and that his opinions on the meaning of phrases used in the wiretap evidence would be helpful to the jury.

On appeal, Vastola argues that the district court erred in its evidentiary ruling because Jones was neither qualified, offered or admitted an expert on loansharking under Fed. R. Evid. 702 and his testimony went beyond scope of permissible lay opinion testimony under Rule 701. Vastola maintains that because " 'loansharking' was the gravamen of all the charges on which [he] was convicted," this improperly admitted testimony caused severe prejudice requiring reversal of his conviction on all counts. We disagree.

In *De Peri*, this court held that a police officer's explanation of cryptic remarks made in tape-recorded conversations between himself and the defendant were admissible under Rule 701 because it was rationally based on his perception of the conversation and helpful to the trier of fact. 778 F.2d at 977. The court noted:

> Martin's language on the tapes is sharp and abbreviated, composed with unfinished sentences and punctuated with ambiguous references to events that are clear only to Martin and

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If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

> his audience. To the uninitiated listener, Martin speaks as if he were using code.

Id.

In *Dicker,* we explained that *De Peri* did not authorize the admission of all opinion testimony regarding the substance of recorded conversations. Such testimony is admissible only to assist in the jury's interpretation of coded portions of the conversations. 853 F.2d at 1109. Where the statements are clear, such opinion testimony is not helpful to the trier of fact and is inadmissible under both Rules 701 and 702. *Id.*

In this case, the loansharking terms explained by Jones fall squarely within the province of "coded" language beyond the comprehension of the average juror, and his opinion testimony was confined to portions of the tape containing those terms. Thus, the helpfulness requirement of both Rules 701 and 702 was met.

The proper provision for admission of Jones's testimony is Rule 702 because Jones lacked personal knowledge of the meaning which the parties to the wiretapped conversations attached to their remarks. In both *De Peri* and *Dicker,* which were decided under Rule 701, the testifying witness was a party to the conversation. Where the witness's interpretation of the conversation is based solely on his "specialized knowledge," the testimony is admissible under Rule 702 if the witness is qualified as an expert. *See United States v. Hoffman,* 832 F.2d 1299, 1310 (1st Cir. 1987) (DEA agent was qualified to interpret codes and jargon used by drug traffickers); *United States v. Nersesian,* 824 F.2d 1294, 1308 (2nd Cir.), *cert. denied,* 484 U.S. 958, 108 S.Ct. 357 (1987); *United States v. Riccobene,*

709 F.2d at 230 (FBI agent qualified to define terms such as "La Cosa Nostra," "Capi," and "consigliere" in organized crime context).

Given that Jones's opinion testimony was admissible for the limited purpose of defining the loansharking terms used by appellants, the sole remaining question is whether the district court abused its discretion in recognizing Jones as an expert. As stated in *Salem v. United States Lines Co.*, 370 U.S. 31, 35, 82 S.Ct. 1119, 1122 (1962), "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous."

Jones's qualifications were more than adequate to qualify him as an expert. He testified that he currently was a detective sergeant assigned to the Economic Crimes and Organized Crime Intelligence Unit of the Union County prosecutor's office. Over the course of his fourteen years of unemployment with that office, he had participated in wiretap investigations. He also had worked participated in wiretap investigations. He also had worked numerous undercover assignments in the investigation of "loansharking, credit card fraud, check fraud and gambling." In view of Jones's experience in the investigation of white collar crimes, including loansharking, it cannot be said that the district court abused its discretion in admitting him as an expert.[29]

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[29] *Aloe Coal Co. v. Clarke Equipment Co.*, 816 F.2d 110, 114 (3d Cir.), *cert. denied*, 484 U.S. 853, 108 S.Ct. 156 (1987), cited by Vastola in support of his argument that insufficient foundation was laid for Jones's testimony, is distinguishable. In *Aloe*, the

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Vastola's final complaint, that the prosecutor never formally moved to have Jones admitted as an expert, requires little discussion. Rule 702 does not condition the admissibility of expert testimony on the proponent's incantation of any particular phrases. While the usual trial practice of moving for the admission of expert testimony may place an adversary on notice that a witness's qualifications are in issue, in this case, the defense was fully aware that Jones would be testifying as an expert, as the prosecutor stated that in colloquy before Jones took the stand. Accordingly, we find that Jones's explanation of the loansharking terms was properly admitted under Rule 702.

G. REFERENCES TO FEDERAL WITNESS PROTECTION PROGRAM

The government did not call John LaMonte, the victim of the MCA extortion, but instead relied primarily on wiretap evidence. To buttress his argument that he was aligned with LaMonte as a buyer in the MCA deal,

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court held that a sales representative for a tractor company was not qualified to give expert testimony in a negligence action as to the cause of a tractor shovel's malfunction. *Id.* Although the witness had extensive experience in determining the costs of repairing and replacing damaged equipment, he had no experience or training which would confer expertise as to how the equipment worked.

Here, Jones's undercover work in loanshark investigations and extensive experience in police wiretapping efforts undoubtedly provided him with knowledge of loanshark jargon beyond that of the average layperson.

Vastola, in his defense, played a tape which purportedly showed that his business dealings with LaMonte were consensual. Over objection, the prosecutor recalled Agent Mahoney in rebuttal to testify about LaMonte's active cooperation with the government. Before Mahoney took the stand, Vastola's attorney objected in colloquy that such testimony would be improper rebuttal because it was unresponsive to any issues raised by the defense. In response, the prosecutor argued that the rebuttal was needed to negate the defense's suggestion that the relationship between Vastola and LaMonte was consensual. The district court allowed the rebuttal on the understanding that it would be narrowly confined to the questions of when LaMonte's period of active cooperation with the government began and ended.

Mahoney testified that LaMonte began to actively cooperate with the government shortly after May 18, 1985. He further testified that LaMonte's period of active cooperation ended in late September of 1985 when "he and his family were placed in FBI protective custody, custody-not custody, but protection and the whole family was removed from the area." This was the last testimony the jury heard.

Defense counsel promptly moved for a mistrial on the ground that Mahoney's reference to the protective custody gave rise to an improper and prejudicial inference that LaMonte had not testified because he was afraid of the defendants. After the district court denied the motion, defense counsel renewed it and requested in the alternative that the court give a missing witness instruction to alleviate the prejudicial impact of Mahoney's testimony. The renewed motion was denied. However, the

following day, the court struck the final portion of Mahoney's testimony and instructed the jury to disregard it.

On appeal, Vastola argues that the district court's cautionary instruction was insufficient to remove the taint of Mahoney's testimony, and that the district court abused its discretion when it refused to give the requested instruction or grant a mistrial. We reject both of these contentions.

The district court's refusal to give a missing witness instruction clearly did not constitute reversible error. In *United States v. Busic*, 587 F.2d 577, 586 (3d Cir. 1978), *rev'd on other grounds*, 446 U.S. 398, 100 S.Ct. 1747 (1980), this court held that a missing witness instruction is not appropriate when the witness is available to both the defense and the prosecution. The court reasoned that the government's failure to call a particular witness does not warrant an inference that the witness's testimony would have been adverse; at most, it signifies that the testimony would have been unhelpful to the government's case. *Id. See United States v. Nahoom*, 791 F.2d 841, 846 (11th Cir. 1986). Here although LaMonte was in the federal witness protection program, there is no indication that he was unavailable to the defense. In fact, Vastola's attorney commendated in colloquy that he declined to call LaMonte because his testimony would have focussed on collateral matters. In these circumstances, a jury instruction that LaMonte's testimony would have favored the defense would no more justified than an instruction that his testimony would have favored the government.

Vastola's contention that he was entitled to a mistrial requires us to examine the nature and severity of the

prejudice he alleges. As a general proposition, we recognize the potential for unfair prejudice flowing from a witness's testimony about his or her involvement in the federal witness protection program. As stated in *United States v. Ciampaglia*, 628 F.2d 632, 640 (1st Cir.) *cert. denied*, 449 U.S. 956, 101 S.Ct. 365 (1980), "a witness's participation in a witness protection program 'is a matter than must be handled delicately' " as the jury might improperly consider evidence of such participation as proof of the defendant's alleged dangerous propensities. *Id.* at 640 (citation omitted). *See also United States v. Nahoom*, 791 F.2d at 845-46; *United States v. Frankenberry*, 696 F.2d 239, 242 (3d Cir. 1982), *cert. denied*, 463 U.S. 1210, 103 S.Ct. 3544 (1983). Arguably, references to a nontestifying victim's participation in the program carry greater potential for prejudice because the jury might falsely infer that the victim's absence was due to fear.

However, not all references to the federal witness protection program are prejudicial to the defense.[30] In *Frankenberry*, we held that the government may elicit the fact of a witness's involvement in the program so long as it "does not exploit any inference of threat from the defendant." 696 F.2d at 242. We further opined that in assessing prejudicial impact of the testimony, a court should consider whether it specifically inculpates the defendant as the source of threats to the witness. *Id.* at 243.

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[30] In fact, in some cases, defense attorneys have sought to use such evidence to impeach the credibility of government witnesses. *See United States v. Pandozzi*, 878 F.2d 1526, 1530 (1st Cir. 1989); *United States v. Tarantino*, 846 F.2d 1384, 1407 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 174 (1988).

If it does, then, on defense counsel's motion, the district court may be obligated to give a cautionary instruction or, in extraordinary cases, declare a mistrial. *See United States v. Carney*, 461 F.2d 465, 468 (3d Cir. 1972). However, the potential for prejudice is slight where the testimony only vaguely suggests that the witness was placed in the program because of threats emanating from the defendant. *Frankenberry*, 696 F.2d at 243. *Accord United States v. Panas*, 738 F.2d 278, 285 (8th Cir. 1984).

Bearing in mind these principles, we are unconvicted that Mahoney's testimony severely prejudiced the defense. Even assuming that the jury improperly inferred that LaMonte's absence was due to fear, given the large number of individuals involved in the RICO enterprise, it would be speculative to presume that any such inference was attributed to appellants' conduct. We further note that the prosecution made no further reference to the Witness Protection Program-it did not "exploit" Mahoney's testimony. Finally, given the overwhelming evidence of appellants' guilt as to the MCA extortion, we would be hard pressed to find that Mahoney's testimony, in itself, irreparably destroyed the defense.

Accordingly, we conclude that the district court did not abuse its discretion when it refused to declare a mistrial. *See United States v. Wright-Barker*, 784 F.2d 161, 175 (3d Cir. 1986). The district court's cautionary instruction was more than adequate to mitigate any unfair prejudice caused by Mahoney's testimony and, in keeping with *Greer v. Miller*, 483 U.S. 756, 766 n.8 107 S.Ct. 3102, 3109 n.8 (1987), we will assume that the jury followed it.

H. APPOINTMENT OF NEW COUNSEL

Saka challenges his conviction on the ground that the district court abused its discretion in denying his pretrial court abused its discretion in denying his pretrial motion for assignment of new counsel. By letter dated October 10, 198[redacted] requested assignment of new counsel because his court-appointed attorney had "developed a series of physical, mental, emotional and domestic problems" as a result of a marital conflict. The district court held a hearing on October 12, 1988, to determine whether the attorney was competent to represent Saka at trial, which was scheduled to begin within a week but did not actually start until November 28, 1988.

At the hearing, Saka stated that he had known about his attorney's "domenstic problems" for approximately two months. Although Saka was satisfied with the attorney's representation of him at various hearings over that period, he felt that he had not adequately conferred with the attorney about trial strategy and believed that the attorney was "not fully able to handle" his case. In response to inquiries by the district court, the attorney acknowledged that he had experienced severe depression when his wife left him on September 8, 1988, and had become apprehensive about his ability to proceed with the case. However, he recently had started taking antidepressant medication and, after an initial adverse reaction which was eliminated by an adjustment of the dosage level, he stated that he felt fine and believed he was competent to represent Saka. The district court denied Saka's motion, stating that the relevant question was his attorney's competence at the time of the hearing. As there was no indication that the attorney currently

was experiencing a debilitating emotional disorder, the district court was satisfied he could effectively represent Saka.

The question before us is whether the district court's denial of the pretrial motion for appointment of new counsel constituted can abuse of discretion and if so, whether the denial caused Saka manifest prejudice requiring reversal of his conviction.[31] Under *United States v. Welty*, 674 F.2d 185, 190 (3d Cir. 1982), a district court, faced with a request for substitution of counsel, has a duty to "inquir[e] as to the reason for the defendant's dissatisfaction with his existing attorney" and should grant the request if "good cause" is shown. *Id.* at 187-88. *See also McMahon v. Fulcomer*, 821 F.2d 934, 942 (3d Cir. 1987).

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[31] Relying on a litany of cases in which this court has expressed its preference for viewing allegations of ineffective assistance of counsel in collateral proceedings under 28 U.S.C. § 2255 rather than on direct appeal, the government argues that Saka's claim is not ripe for review. *See United States v. Sandini*, 888 F.2d at 312; *Government of Virgin Islands v. Forte*, 806 F.2d 73, 77-78 (3d Cir. 1986); *United States v. Gambino*, 788 F.2d 938, 950 (3d Cir.) *cert denied*, 479 US. 825, 107 S.Ct. 98 (1986). Saka, however, does not claim ineffective assistance of counsel but instead challenges a pretrial ruling that he was not entitled to substitution of counsel. While this claim implicates Sixth Amendment considerations insofar as we must consider whether Saka suffered any prejudice as a result of the district court's decision, Saka has not invoked directly his right to effective assistance of counsel. Accordingly, we conclude that the claim is reviewable on direct appeal. We further note that Saka remains free to raise a constitutional challenge his attorney's performance in a subsequent proceeding under section 2255.

Based on the record as it appeared at the time of the hearing, the district court acted well within its discretion in denying Saka's motion.[32] As the district court observed, the relevant question was whether at the time of the hearing, it appeared likely that the attorney could serve as a reasonably effective advocate at trial. Although Saka may have lost confidence in his attorney when he learned about the attorney's bout with depression, that alone would not constitute "good cause" for substitution of counsel, as Saka had no absolute right to counsel of his choice, *Davis v. Stamler*, 650 F.2d 477, 479-80 (3d Cir. 1981), or to a special rapport with his attorney, *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617 (1983). To prevail on his motion. Saka had to show that his attorney currently was experiencing problems so severe as to call into doubt his ability to render competent assistance at trial.

In view of Saka's own testimony that he had no specific objection to the attorney's representation of him at pretrial hearings and the attorney's assurances that he was prepared for trial and had overcome his previous emotional difficulties, there was no reason for the district court to have granted the motion. Certainly, it cannot be said that every attorney who has experienced an emotional crisis while preparing for a trial automatically must be disqualified from proceeding with the representation. If the attorney is competent and adequately prepared at the time of trial, it is within the discretionary power of the district court to refuse to substitute new counsel.

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[32] In fact, the district court is to be commended for the sensitivity is displayed in evaluating Saka's claim.

Given our finding that there was no abuse of discretion, we need not consider whether Saka suffered prejudice as a result of the district court's decision. However, even assuming an abuse of discretion, we still would have no basis for reversing Saka's conviction because he has not claimed that he was prejudiced by the ruling. As recently observed in *Sandini*, 888 F.2d at 305, our inquiry into the propriety of a discretionary pretrial ruling involves "two separate determinations," whether the district court exceeded its discretion and whether the defendant thereby was prejudiced. As Saka has pointed to nothing in the record which suggests that his fears at the time of the hearing materialized, we would have no choice but to reject his claim even if he had demonstrated good cause for the appointment of new counsel.

I. THE ELECTRONIC SURVEILLANCE

1. *Background*

The government's evidence at trial consisted largely of tapes made from electronic surveillances of conversations between the co-conspirators from late 1984 to October 1985 pursuant to state and federal court orders, as well of tapes of consensually recorded conversations from May 1985 to September 1985 between the co-conspirators and John Lamonte, the victim of the MCA extortionate collection conspiracy.

State and federal authorities engaged in surveillance activities in at least four jurisdictions – New Jersey, Maryland, and the Southern and Northern Districts of New York – and, at the conclusion of the surveillances, all of the tapes were sealed in accordance with the Wiretap

Act.[33] 18 U.S.C. § 2518(8)(a). The sealing orders pertaining to the federal tapes provided that the FBI was to maintain custody of the tapes and that the contents of the tapes were to be disclosed only pursuant to court order, except as provided by 18 U.S.C. § 2517.

On October 6, 1987, Judge Breitkopf of the New Jersey Superior Court entered orders permitting the unsealing by a federal district court judge of approximately seven state wires, covering over a hundred reels of tape, "for use in the preparation and during the several trials of" the defendants named in the original indictment. All

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[33] In 1987, when the district court granted appellants' motion for severance, it also denied a motion, joined in by all defendants named in the original indictment, to suppress evidence from the electronic surveillance. *United States v. Vastola*, 670 F. Supp. 1244, 1276 (D.N.J. 1987). In that ruling, the court expressly found, with few exceptions, that the government had adequately shown probable cause for the surveillances and that the surveillance orders themselves were valid. *Id.* Appellants also moved to suppress evidence from the wiretapping of Video Warehouse, the situs of the criminal enterprise, on the ground that the wiretapping ended on March 25, 1985, but the tapes were not sealed until July 15, 1985. *Id.* at 1282. The court found that the integrity of the tapes had not been compromised and therefore suppression was not justified. *Id.* (citing *United States v. Falcone*, 505 F.2d 478, 484 (3d Cir. 1974)).

On appeal, Saka argues that the tapes should have been suppressed due to the governments delay in sealing them but has not challenged the district court's finding that the tapes had not been altered. As the district court's decision was fully consistent with *Falcone*, we will not further discuss the implications of the sealing delay. Saka has not appealed the district court's ruling that the initial interception order was supported by probable cause.

of the orders specified that the tapes were to be "maintained in a secure place within the Offices of the United States Attorney for the District of New Jersey." The government has conceded a "technical departure" from Judge Brietkopf's unsealing order in that the tapes were not physically unsealed before a federal judge.

On October 15, 1987, the district court ordered the unsealing of numerous federal tapes which resulted from surveillances in New Jersey for use in the pretrial preparation and trials in *United States v. Vastola*. The order was issued pursuant to a supporting affidavit filed by an Assistant United States Attorney which stated that unsealing was necessary "so that electronically enhanced copies of portions of the recordings [could] be prepared for use as trial exhibits." Unlike Judge Brietkopf, the district court did not specify where custody of the tapes was to be maintained.

On August 5, 1988, Judge Howey of the United States District Court for the District of Maryland ordered the unsealing of the "Maryland" tapes, specifying that custody was to be maintained by special FBI agents in Newark, New Jersey. He also stated that "[t]he Special Agents in whose custody such tape recordings are released may permit technicians working with the United States Attorney's Office for the District of New Jersey to make copies of them." A similar order was entered by Judge Scully of the United States District Court for the Southern District of New York on April 6, 1988.

After the unsealing orders were executed, the government sent all of the original tapes to Paul Ginsberg, a

private individual it had employed to enhance and authenticate the tapes. It is undisputed that Ginsberg had unsupervised possession of the tapes for approximately 35 days while he was enhancing them, and that he was not deputized by any court to perform that function.

Ginsberg testified as an expert about the procedures he had used in enhancing the tapes. He explained that

> [e]nhancement is a misnomer. We don't enhance anything per se. But rather we'll take a signal from a tape recorder on which there is a conversation recorded, feed it through certain equipment which is designed to null out or minimize offending signals or other noise which is beyond the limits of the human voice spectrum, and the results is what we call the enhanced copy.

Appendix at 485.

He asserted that in the filtration process, there is no risk of alteration in the content of the enhanced copy, and that the original tapes are in no way modified. Ginsberg placed the originals in a locked storage container when he was not using them. At the government's request, Ginsberg also examined the tapes for signs of tampering before and after he enhanced them and concluded that the integrity of the tapes had not been compromised.

2. *Admissibility of Evidence from Electronic Surveillance*

Saka argues that the district court erred in admitting the tapes from the electronic surveillance because the government violated the various court unsealing orders in contravention of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20

[hereinafter Wiretap Act].[34] Specifically, he maintains that the government, in sending the tapes to Ginsberg for enhancement, exceeded the scope of the unsealing orders, which never contemplated that a private individual would have unsupervised custody of the tapes for a prolonged period of time, or that the government would do anything more than copy the tapes for trial.

Saka relies on section 2518(8)(a) of the Wiretap Act, which provides in pertinent part that:

> The contents of any wire, oral or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. . . . . Immediately upon the expiration of the period of the [wiretap] order, or extensions thereof, *such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders.* . . . The presence of the seal . . . or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

18 U.S.C. § 2518(8)(a) (emphasis supplied).

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[34] He also suggests that the New Jersey state tapes were never unsealed. Presumably, he is referring to the government's failure to comply with Judge Brietkopf's order, which required the participation of a federal district court judge in the unsealing process. This technical infraction of the unsealing order does not, however, warrant a conclusion that the tapes were never unsealed. Although the government did not strictly comply with the terms of Judge Brietkopf's orders, that does not negate the fact that the unsealing orders were entered and executed.

Section 2517(3), in turn, provides for the use of such tapes as evidence in federal and state criminal proceedings.

According to Saka, section 2518(8)(a) evinces legislative intent that courts will closely supervise all phases of the government's handling of evidence derived from electronic surveillances. He analogizes this case to situations where other courts have held that, in certain circumstances, it might be necessary to suppress evidence due to lengthy delays in the sealing of the tapes. *See, e.g., United States v. Ojeda Rios,* 875 F.2d 17 (2d Cir. 1989), *cert. granted,* 110 S.Ct. 231 (1989); *United States v. Mora,* 821 F.2d 860 (1st Cir. 1987).

As the government points out, however, section 2518(8)(a) on its face deals with *sealing* requirements, rather than with the use or treatment of tapes after their unsealing. The government relies-as did the district court-on section 2517(2). Under that section:

> [a]ny investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral or electronic communication or evidence derived therefrom may use such *contents to the extent such use is appropriate to the proper performance of his official duties.*

18 U.S.C. § 2517(2) (emphasis supplied).

According to the government, its enhancement of the tapes falls squarely within section 2517(2) because it was part of the United States Attorney's trial preparation and thus was incident to the performance of an "official duty."

Neither party is entirely correct, although the government's ultimate conclusion that the tapes were admissible is unassailable. Reading subdivision (2) of section 2517 in light of its legislative history and the section as a whole, it seems clear that, in that subdivision, Congress was concerned with the substantive use of information contained in tapes rather than with the physical treatment of the tapes themselves. Section 2517(1) limits the disclosure of the tapes' contents to an "investigative or law enforcement officer" to situations where the disclosure "is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure." 18 U.S.C. § 2517(1). Other subdivisions of section 2517 address the use of such evidence in criminal proceedings, section 2517(3), the privileged character of the evidence, section 2517(4), and preconditions for the use of evidence of crimes not enumerated in the original interception application, section 2517(5).

Furthermore, the legislative history to section 2517(2) indicates that, by "use . . . appropriate to the proper performance of . . . official duties," Congress "envision[ed] use of the contents of intercepted communications . . . to establish probable cause for arrest . . . [or] search" or other substantive uses. S. Rep. No. 1097, 90th Cong., 2d Sess. 107, *reprinted in* 1968 U.S. Code Cong. & Admin. News., at 2188. In view of its legislative history, it is difficult to see how this provision could apply to a government use alleged to compromise the physical integrity of the tapes.

In fact, no section of the Act expressly defines the government's responsibility in handling tapes subsequent to the execution of an unsealing order; such cases fall

within a statutory gap. *See United States v. Angiulo*, 847 F.2d 956, 977 (1st Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 314 (1988). However, we cannot infer from this legislative oversight that Congress was indifferent to the government's treatment of tapes after their unsealing, as an overriding legislative concern quite clearly was to prevent the admission of wiretap evidence which has been subject to tampering. Therefore, while the literal language of section 2518(8)(a) would indicate that the section is limited to the sealing requirement, we will consider the propriety of the enhancement under that section, as we agree with Saka that it is the primary vehicle through which Congress sought to ensure the physical integrity of wiretap evidence.[35] *Accord Angiulo*, 847 F.2d at 977 ("the standards applicable in delay-of-sealing cases . . . are relevant to the unsealing problem").

The government contends that suppression is available under section 2518(8)(a) only where there is no seal affixed to the tapes "or a satisfactory explanation for the absence thereof."[36] As the tapes were unsealed by court

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[35] The legislative history to section 2518(8)(a) indicates that it was intended to establish procedures "to safeguard the identity, physical integrity, and contents of the recordings to assure their admissibility into evidence." 1968 U.S. Code & Admin. News at 2193. Furthermore, the legislative history to section 2517 states that it "must . . . be read in light of section 2518." *Id.* at 2188. Therefore, even if we applied section 2517 and concluded that the enhancement was incident to the performance of official duties, we still would be bound to consider whether admission of the tapes was consistent with section 2518.

[36] The government also argues that, insofar as Saka challenges an unauthorized disclosure of the contents of the wire

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order, the government maintains that it had a satisfactory explanation for the absence of a seal and therefore, suppression was unwarranted. This argument, although consistent with the literal language of section 2518(8)(a), is unresponsive to the specific problem raised by Saka, which concerns the government's responsibilities in handling the tapes after their unsealing. As pointed out in *United States v. Mora*, 821 F.2d at 864-65, which involved a sealing delay, a literal construction of section 2518(8)(a) could lead to outlandish results, as it would permit the admission of tapes which remained unsealed for months as long as the government had them sealed on the eve of trial. 821 F.2d at 865 ("An untimely seal contravenes the

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intercepts to Ginsberg, he is limited to the civil remedy set forth in section 2520. That assertion clearly is correct. *See United States v. Iannelli*, 477 F.2d 999, 1001 (3d Cir. 1973), *aff'd on other grounds*, 420 U.S. 770, 95 S.Ct. 1284 (1975) ("the suppression remedy specified in 18 U.S.C. § 2518(10) applies to unlawful interceptions. A civil remedy applies to unauthorized disclosures. 18 U.S.C. § 2520."). *See also Resha v. United States*, 767 F.2d 285, 288 (6th Cir. 1985), *cert. denied*, 475 U.S. 1081, 106 S.Ct. 1458 (1986); *United States v. Vento*, 533 F.2d 838, 855 (3d Cir. 1976). Therefore, in a civil proceeding under section 2520, Saka is free to argue that a private individual never should have been privy to the contents of the tapes because they were privileged. 18 U.S.C. § 2517(4). We will not resolve that question in a direct appeal from a criminal conviction.

As we understand Saka's argument, however, the gravamen of his complaint is that the government failed to comply with court orders intended to ensure the physical integrity of the tapes and, if its conduct is approved by this court, the statutory safeguards of Title III will be undermined. Accordingly, we are treating this as a "physical integrity" case.

spirit of the statute just as much as a missing seal."). By the same token, it strains credulity to suggest that Congress authorized the admission of all wiretap evidence which is unsealed, without regard for how the tapes were treated after their unsealing.

The primary purpose of section 2518(8)(a), however, is to ensure the physical integrity of the tapes. *Mora*, 821 F.2d at 867; *United States v. Diadone*, 558 F.2d 775, 780 (5th Cir. 1977), *cert. denied*, 434 U.S. 1064, 98 S.Ct. 1239 (1978); *United States v. Angelini*, 565 F.2d 469, 471 (7th Cir. 1977), *cert. denied*, 435 U.S. 923, 98 S.Ct. 1487 (1978); *United States v. Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), *cert. denied*, 420 U.S. 955, 95 S.Ct. 1339 (1975). In *Falcone*, a "sealing delay" case, we held that:

> where the trial court has found that the integrity of the tapes is pure, a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom.
>
> 505 F.2d at 484.

This holding was consistent with *United States v. Giordano*, 416 U.S. 505, 527, 94 S.Ct. 1820, 1832 (1974), where, in reference to an unlawful interception, the Supreme Court stated that "Congress intended to require suppression where there is a failure to satisfy those statutory requirements that *directly and substantially* implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extrordinary investigative device." Thus, not every technical infraction of the statute mandates suppression. Rather, the defendant must point to a statutory violation which creates a serious risk that the legislative purpose will be thwarted. *See United States v.*

Chavez, 416 U.S. 562, 574-75, 94 S.Ct. 1849, 1856 (1974) ("suppression is not mandated for every violation of Title III.")[37]

Here, Ginsberg gave compelling testimony that the integrity of the tapes was not compromised in the enhancement process. We realize that the some appellate courts have indicated that wiretap evidence may be suppressed without proof of tampering on the theory that alterations of the recordings often are difficult to detect. *See United States v. Massino*, 784 F.2d 153, 156 (2d Cir. 1986); *United States v. Johnson*, 696 F.2d 115, 124 (D.C. Cir. 1982) (interpreting D.C. Code). *Cf. United States v. Ojeda Rios*, 875 F.2d at 23 (lengthy delay in sealing of tapes requires suppression unless government proffers a "satisfactory explanation" for the delay). However, even if we were inclined to follow these cases, this would not be an appropriate time for doing so, as Ginsberg's uncontroverted

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[37] *Giordano* and *Chavez* both were decided under section 2518(10)(a), which provides for the suppression of "unlawfully intercepted" communications, evidence obtained pursuant to an "insufficient" authorization order, and evidence obtained through interceptions "not made in conformity" with the order. Neither the Supreme Court nor this court has had occasion to decide whether section 2518(8)(a) furnishes a basis for suppression independent of section 2518(10)(a). If the suppression remedy is confined to section 2518(10)(a), then the government could with impunity engage in the wholesale editing of all tapes lawfully intercepted, because section 2518(10)(a) on its face deals only with interceptions. Given our conclusion that the tapes were lawfully admitted, we need not resolve this question today. However, we do point out that it is highly unlikely that Congress intended to allow a criminal conviction to rest on wiretap evidence which had been subject to tampering.

testimony was that tampering can be detected by competent experts in the field of electronic enhancement and, in any event, Saka does not seriously contend that the tapes were subject to tampering. Therefore, we have no basis for concluding that the type of harm the statute was meant to prevent occurred here.

Accordingly, we hold that the tapes were admissible notwithstanding the government's technical infraction of the custody requirements of the unsealing orders, as there is no showing that the government's relinquishment of control over the tapes caused a "direct[] and substantial[]" violation of section 2518(8)(a).

IV. CONCLUSION

We have considered appellants' remaining contentions and find them to be without merit.[38] In view our

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[38] Vastola asserts that the district court abused its discretion when it permitted two law enforcement officers to testify, over objection, that they were assigned to organized crime units. According to Vastola, this background evidence was inadmissible under Fed. R. Evid. 403 because its probative value was outweighed by its prejudicial effect, as it gave rise to an improper inference that appellants had organized crime connections. Our scope of review of this question is limited. *United States v. Long*, 574 F.2d 761, 767 (3d Cir.), *cert. denied*, 439 U.S. 985, 99 S.Ct. 577 (1978). In this case, we do not believe that the district court exceeded its discretion, as evidence regarding the officers' unit assignments served the legitimate purpose of apprising the jury of their qualifications for investigating appellants' activities. *Cf. United States v. Daley*, 842 F.2d 1380, 1388-89 (2d Cir. 1988) (background evidence as to structure of organized crime families was properly admitted under Rule 403 balancing test).

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decision herein, the judgment of conviction and sentence of Vastola under Count 2 will be reversed and he will be acquitted on that count and the judgment of acquittal for Vastola under Count 1 will be reversed and his conviction will be reinstated on that count. Except to the foregoing extent regarding Vastola, appellants' convictions will be affirmed. The case will be remanded to the district court for further proceedings consistent with this opinion. Vastola shall be sentenced on count one and shall be resentenced on all the other counts on which he was convicted except for Count 2. *See United States v. Sebetich*, 776 F.2d 412, 415 & n.2 (3d Cir. 1985), ___ U.S. ___, *cert. denied*, 108 S.Ct. 725 (1988).

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Saka contends that three warrants to search his automobile, residence and business for evidence of copyright violations failed to satisfy the Fourth Amendment particularity requirements. As a result, he argues that "[a]ll of the video recordings, blank tapes and video equipment should have been suppressed." He does not, however, point to any evidence introduced at trial which was seized pursuant to the allegedly defective warrants. Because Saka was not prosecuted for copyright violations, and has not demonstrated that any unlawfully seized evidence was used against him at trial, we need not reach the Fourth Amendment issues he raises. Assuming, *arguendo*, that the warrants were constitutionally deficient and that evidence obtained pursuant to them was improperly admitted, a reversal on this ground still would be inappropriate because the government's most damaging evidence against Saka derived from its electronic surveillance of Video Warehouse and other locations. Accordingly, at best, he has pointed to a constitutional error which was harmless beyond a reasonable doubt. *See Chapman v. State of California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967); *United States v. Clemons*, 843 F.2d 741, 753 (3d Cir.), *cert. denied*, ___ U.S. ___, 109 S.Ct. 97 (1988).

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	CRIM. ACTION No. 86-301(SSB)
v.	:	
GAETANO VASTOLA, *et al.*,	:	**OPINION**
Defendants.	:	(Filed Aug. 17, 1993)

APPEARANCES:

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BROTMAN, District Judge.

Presently before the court is a narrow issue on remand from the Third Circuit Court of Appeals concerning the suppression of certain electronic surveillance tapes under the Wiretap Act, 18 U.S.C. § 2518(8)(a). In particular, the court must determine whether a government attorney who made an unreasonable mistake of law as to when these tapes were required to be sealed nevertheless acted in a reasonably prudent manner in investigating this legal issue. *United States v. Vastola*, 989 F.2d 1318, 1327 (3d Cir. 1993) (*Vastola III*). Upon careful consideration of the relevant record and of the parties' submissions, and for the reasons stated herein, the court finds that the government attorney's behavior was reasonable under the circumstances and that, therefore, it was proper to refuse to suppress the tapes.

I. Background and Procedure

The extensive background to this criminal case in general and on the issue of whether to suppress certain electronic surveillance tapes has been the subject of several reported decisions. *See, e.g., Vastola III*, 989 F.2d 1318 (3d Cir. 1993); *United States v. Vastola*, 915 F.2d 865 (3d Cir. 1990) (*Vastola II*), *cert. denied*, 498 U.S. 1120 (1991); *United States v. Vastola*, 899 F.2d 211 (3d Cir.) (*Vastola I*), *vacated and remanded*, 497 U.S. 1001 (1990). The court therefore discusses only the facts and procedure relevant to the issue to be addressed on remand.

On May 3, 1989, this court entered an order of judgment and commitment against Defendant Vastola after a jury found him guilty of two substantive RICO offenses under 18 U.S.C. § 1962(c), a RICO conspiracy offense

under 18 U.S.C. § 1962(d), and a conspiracy to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. § 894. Vastola had been charged, along with 20 other co-defendants, in a 114 count indictment. Prior to trial, Vastola and the other defendants filed an omnibus motion that included a request for the suppression of the electronic tapes obtained from the government's surveillance of the Video Warehouse in West Long Branch, New Jersey, between March 15, 1985 and May 31, 1985. The tapes were not sealed until July 15, 1985, more than 45 days after the final interception on May 31, 1985 and 32 days after the June 13, 1985 expiration date of the order authorizing the surveillance. Defendants contended that the West Long Branch tapes should be suppressed pursuant to the Wiretap Act, 18 U.S.C. § 2518(8)(a).[1]

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[1] Section 2518(8)(a) provides, in pertinent part:

> The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. . . . The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

18 U.S.C. § 2518(8)(a).

In considering the Wiretap Act suppression issue, the district court, in effect, determined that the sealing was untimely. However, the court refused to suppress the tapes, relying on the case of *United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975), for the rule that suppression is warranted only where it can be shown that the physical integrity of the tapes had been compromised. Because the government had established by clear and convincing evidence the physical integrity of the West Long Beach tapes, the court denied Vastola's and the other defendants' motion to suppress. *See United States v. Vastola*, 670 F. Supp. 1244, 1282 (D.N.J. 1987), *aff'd in part, rev'd in part*, 899 F.2d 211 (3d Cir.), *vacated and remanded*, 497 U.S. 1001 (1990).

On appeal, the Third circuit essentially affirmed Vastola's judgment of conviction on March 20, 1990. *Vastola I*, 899 F.2d 211 (3d Cir. 1990).[2] In a footnote, the court of appeals noted that the district court's refusal to suppress the West Long Beach tapes was "fully consistent" with *Falcone*. *Id.* at 238 n.33. Thereafter, Vastola filed in the United States Supreme Court a petition for a writ of certiorari. On June 25, 1990, the Supreme Court vacated the judgment of the Third Circuit and remanded the matter for further consideration in light of the recently decided case of *United States v. Ojeda Rios*, 495 U.S. 257 (1990). *See Vastola v. United States*, 497 U.S. 1001

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[2] The Third Circuit reversed the district court's ruling granting Vastola's motion for entry of a judgment of acquittal on one of the substantive RICO counts, and found that the conviction on the other substantive RICO count must be reversed on the ground of insufficiency of the evidence. 899 F.2d at 215.

(1990). In *Ojeda Rios*, the Court held that a delay in sealing authorized electronic surveillance tapes requires a suppression of the tapes unless the government offers a "satisfactory explanation" for the sealing delay. Expressly rejecting the Third Circuit's rule in *Falcone*, the Court read section 2518(8)(a) to require that the actual reason for the sealing delay be objectively reasonable at the time of the delay. 495 U.S. at 265-67 & 265 n.5.

On remand from the Supreme Court, the Third Circuit in *Vastola II* determined that a sealing delay did in fact occur with respect to the West Long Branch tapes. 915 F.2d 865, 875 (3d Cir. 1990). The Third Circuit then vacated Vastola's conviction and remanded the matter to the district court to ascertain the actual reason for the sealing delay and whether this reason was objectively reasonable so as to constitute a satisfactory explanation under *Ojeda Rios* and section 2518(8)(a) of the Wiretap Act. *Id.* at 876-77.

On the first remand, the district court determined that "the actual reason for the sealing delay was that the Assistant United States Attorney in charge of the electronic surveillance, Diana Armenakis, and her supervisor on the case, Thomas Roth, believed that the Wiretap Act did not require sealing until the end of the entire investigation." *United States v. Vastola*, 772 F. Supp. 1472, 1481 (D.N.J. 1991), *vacated and remanded*, 989 F.2d 1318 (3d Cir. 1993). The court then found that Roth's and Armenakis' interpretation of the statute, although wrong in light of subsequent rulings, "was objectively reasonable at the time of the sealing delay." *Id.* at 1483. Based on these findings, the district court held that the government had

offered a "satisfactory explanation" as required by section 2518(8)(a) of the Wiretap Act, and that therefore the tapes had been properly admitted at trial. *Id.* Accordingly, the court reinstated Vastola's conviction.

Defendant once again appealed. In *Vastola III*, the Third Circuit affirmed this court's finding as to the actual reason for the sealing delay. *See* 989 F.2d 1318, 1325 (3d Cir. 1993). However, the court of appeals, relying on its earlier decision in *United States v. Carson*, 969 F.2d 1480 (3d Cir. 1992), reversed as to the finding that this explanation was objectively reasonable. *See* 989 F.2d at 1327. But the Third Circuit refused to rule in Vastola's favor because "an unreasonable mistake of law does not automatically lead to suppression." *Id.* Rather:

> When a government attorney's legal conclusion is found to be unreasonable, the explanation for the delay would still be an objectively reasonable "mistake of law" if the government can show that its attorney has adequately researched the law or has otherwise acted reasonably.

Id. For a second time, the Third Circuit vacated Vastola's conviction and remanded the case back to this court to determine if " 'the attorney involved acted as a "reasonably prudent" attorney would to investigate the legal question involved in a reasonably prudent manner.' " *Id.* (quoting *Carson*, 969 F.2d at 1494). if so, then the government's explanation is a satisfactory one, and Vastola's convictions must again be reinstated because the tapes were properly admitted at trial in accordance with the Wiretap Act.

II. Discussion

The narrow question before the court is whether "Armenakis conducted herself reasonably under the circumstances." *Vastola III*, 989 F.2d 1318, 1327 (3d Cir. 1993). The burden of proof falls upon the government. *Id.* The standard for making this determination is one of objective reasonableness. An attorney's actions will be considered objectively reasonable where, given the existing circumstances, she undertakes " 'a normally competent level of legal research' " to support the conclusion she reaches. *Mary Ann Peniero, Inc. v. Lingle*, 847 F.2d 90, 94 (3d Cir. 1988) (quoting *Leib v. Topsite Indus., Inc.*, 788 F.2d 151, 157 (3d Cir. 1986)). The court borrows this formulation from the Third Circuit's Rule 11 jurisprudence. This is proper because the goal of Rule 11 is to ensure accountability by requiring counsel to conform to "conduct that would be expected of a competent attorney" before signing a pleading, motion, or other paper to be submitted to the court. *See* 2A *Moore's Federal Practice* ¶ 11.01[3.-1], at 11-36. Thus, as the Ninth Circuit has stated:

> It is obvious from the text of the Rule that the pleader need not be correct in his view of the law. . . . The pleader, at a minimum, must have a 'good faith argument' for his or her view of what the law is, or should be. A good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after 'reasonable inquiry.' Such inquiry is that amount of examination into the facts and legal research which is reasonable under the circumstances of the case.

Zaldivar v. City of Los Angeles, 780 F.2d 823, 830-31 (9th Cir. 1986). This is precisely the kind of inquiry that may

be used to evaluate whether a government attorney's [sic] acted with reasonable prudence in researching the sealing issued, as required by the Third Circuit.

Defendant suggests that a government attorney, who "is in a peculiar and very definite sense the servant of the law," should be judged by a higher standard than used to evaluate a private attorney. *See Berger v. United States*, 295 U.S. 78, 88 (1935). in particular, defendant relies on dictum from *Freeport-McMoRan Oil & Gas Co. v. Federal Energy Regulatory Comm'n.*, 962 F.2d 45 (D.C. Cir. 1992), in which the court condemned "the remarkable assertion at oral argument that government attorneys ought not to be held to higher standards than attorneys for private litigants." *Id.* at 46.[3] While not unsympathetic with defendant's position, this court is nevertheless mindful that the present matter comes before it on the posture of a very specific and narrow remand in which the court of appeals has clearly defined the standard of review as that of a "reasonably prudent attorney" acting in a "reasonably prudent manner." 989 F.2d at 1329. Accordingly, this is the standard the court applies today.

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[3] As the D.C. Circuit observed:

> The notion that government lawyers have obligations beyond those of private lawyers did not originate in oral argument in this case. A government lawyer 'is the representative not of an ordinary party to a controversy,' the Supreme Court said long ago in a statements chiseled on the walls of the Justice Department, 'but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.' "

962 F.2d at 47 (quoting *Berger*, 295 U.S. at 88)).

In its opinion on first remand, the district court made the following findings as to the legal research undertaken by Diana Armenakis, the Assistant United States Attorney in charge of the electronic surveillance at the West Long Branch Video Warehouse:

> Armenakis' understanding of the sealing requirement under the Wiretap Act "was that when the investigation was completed that you immediately sealed whatever tapes had been obtained." Transcript at 42-43; *see* Transcript at 75, 76-78. She obtained this understanding by studying "the statute and several of the annotations. I spoke with other more experienced attorneys in the office on wiretaps and it was . . . my understanding which appeared to be consistent throughout the office." Transcript at 43, 77-79. When she "began the investigation, [she] outlined that statute and [she] read relevant annotations." Transcript at 81-82. While at the United State's Attorney's Office, Armenakis was given a manual to review and maintain, *Proving Federal Crimes* which contained some information on electronic surveillance; however, she was given no specific training in that area. Transcript at 47, 48-49. She did not recall reviewing any particular guidelines, instructions, manuals, treatise, or cases with regard to her sealing obligation with the West Long Branch Video Warehouse premises although she "was reviewing documents all the time." Transcript at 74-75, 48-49.

Id. at 1480.[4] The court also found that Assistant United States Attorney Thomas Roth was involved in the electronic surveillance at the Video Warehouse in a supervisory capacity. *Id.* at 1479 (citing Transcript at 8). Roth's understanding of the sealing requirement was based principally on his reading of the statute, the caselaw and his experience from prior surveillance cases. *Id.* at 1479 (citing Transcript at 14-15). Like Armenakis, Roth understood the law to require sealing upon "the termination of

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[4] Defendant appears to challenge this court's finding that Armenakis read the statute and read the relevant annotations. *See* Def.'s Br. at 28-29. During her testimony, Armenakis clearly stated at least three times that she undertook this research. *See* Transcript at 43, 79, 81-82. However, defendant suggests that this testimony is contradicted by her later statement that she did not recall researching the sealing issue.

Defendant mischaracterizes this testimony. On cross-examination by defense counsel, the following colloquy occurred:

> Q. Miss Armenakis, could you identify one case, one manual, one treatise, one guideline, one directive to support your understanding of what the sealing requirement was in 1985?
>
> A. I haven't research that issue in preparation for today. The answer is, no, at this point I cannot.
>
> Q. Did you research it in 1985?
>
> A. I don't recall.

Transcript at 83. A careful reading of this exchange establishes that the second question and answer must be read in light of the first. Thus, when Armenakis states that she cannot recall, it is in reference to whether she researched the sealing issue by looking at cases, manuals, treatises, guidelines, or directives. Notably absent from the list in the first question are the words inconsistent with this court's finding that she read the relevant annotations on the sealing issue.

all interceptions relating to a specific investigation." *Id.* (quoting Transcript at 10, 17).[5]

Applying the above-articulated standard to these facts, the court concludes that Armenakis acted reasonably under the circumstances. The critical aspect in this case is the interaction between Armenakis' own research and the authoritative confirming advice she received from other, more experienced United States Attorneys in her office. Armenakis' research, which consisted of reading and outlining the statute and reviewing the relevant annotations, was enough to give an average attorney a basic understanding of the law. However, standing alone, this limited investigation cannot be considered a normally competent level of research that a reasonably prudent attorney would undertake. The meaning of a complex statute, such as the Wiretap Act, is not always readily ascertainable from just reading the text; and annotations often fail to fully reflect how caselaw has interpreted a statutory provision. Thus, a reasonably prudent attorney in Armenakis' position must augment her investigation in order for her behavior to constitute objectively reasonable conduct.

One way Armenakis could have supplemented her research would have been by reading the relevant cases on the sealing requirement. This she did not do. However, Armenakis did not rely solely on her research of reading the statute and the relevant annotations. She also

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[5] Because the December 14, 1990 hearing, at which Roth and Armenakis testified, provides a sufficient factual basis for the question now on remand, the court finds there is no need for the taking of addition [sic] evidence.

took the further step of having her understanding of the sealing requirement confirmed by the advice of more experienced lawyers in the United States Attorneys Office.

In *United States v. Carson*, 969 F.2d 1480 (3d Cir. 1992), the Third circuit suggested that under appropriate circumstances, an attorney may be acting in a reasonably prudent manner by relying upon another lawyer's statements as to a rule of law without undertaking an independent examination of the law. *Id.* at 1494-95. According to the Third Circuit, "[i]t is not always unreasonable for an attorney to rely on a reasoned oral opinion of a supervisor, or even that of a peer with more experience in the area of law in question." *Id.* at 1495. This suggestion recognizes that, as a practical matter, some attorneys within a law office are more knowledgeable about particular legal subjects and that other attorneys may reasonably rely upon the advice given them as authoritative. Thus, under the appropriate circumstances, an attorney who has undertaken a rudimentary level of research and who has had her understanding of the law confirmed by more knowledgeable and experienced colleagues, need not necessarily undertake further research in order to have performed a normally competent level of legal research. *Cf. Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 558 (9th Cir. 1986) (in Rule 11 context, "reliance on forwarding co-counsel may in certain circumstances satisfy an attorney's duty of reasonable inquiry"), *cert. denied*, 484 U.S. 823 (1987).

In the present case, Armenakis was entitled to place a substantial amount of weight on the opinion of her more experienced colleagues in the United States Attorney's

Office. Although Armenakis does not recall which United States Attorney she spoke to about the sealing requirement, *see* Transcript at 45, it is fair to infer that Roth's view of the law represented the general understanding of the office.[6] Roth's view, which was based on his reading of the statute and cases and on his experience, was clearly the result of an adequate level of research. These facts and circumstances made it reasonable for Armenakis to place substantial reliance upon the view of her colleagues as the requirements of the Wiretap Act. Armenakis' failure to undertake further research into the sealing requirement above and beyond reading the statute and the relevant annotations did not fall below the standard for reasonably prudent behavior, given the fact that she had her understanding of the law confirmed by the view of the other, more experienced attorneys in her office.

Thus, Armenakis' reliance on authoritative advice given by her colleagues constituted an adequate substitute for further reading of the caselaw, and her behavior was objectively reasonable under the circumstances. Because the government has therefore offered a "satisfactory explanation" for the failure to timely seal the West

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[6] The court derives this inference from the following facts: Roth was involved in the investigation involving electronic surveillance at the Video Warehouse in a supervisory capacity, *see* 772 F. Supp. at 1479 (citing Transcript at 8); and Roth had the most experience of any attorney in the United States Attorney's office in New Jersey with respect to interceptions pursuant to the Wiretap Act, *see id.* (citing Transcript at 9). It is fair to conclude from these facts that Roth's understanding of the sealing requirement was representative of the understanding obtained by Armenakis from her colleagues.

Long Branch tapes, the court holds that these tapes were properly admitted at trial. As a result of this holding, the court does not reach the issue of harmless error.

III. Conclusion

For the reasons stated above, the court finds that the actions of the government attorney were objectively reasonable in light of the circumstances. The actual reason for the delay in sealing the West Long Branch tapes was therefore a "satisfactory" one within the meaing of section 2518(8)(a) of the Wiretap Act. Accordingly, the court holds that the West Long Branch tapes were properly introduced at trial and suppression is not required.

An appropriate order reinstating the convictions of Defendant Vastola will be entered.

/s/ _____
Stanley S. Brotman
United States
District Judge

DATED: August 17, 1993.

APPENDIX VI

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	CRIM. ACTION
	:	#86-301(SSB)
v.	:	
GAETANO VASTOLA, *et al.*,	:	**OPINION**
Defendants.	:	
	:	(Filed
	:	Aug. 16, 1991)

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BROTMAN, District Judge.

I. INTRODUCTION

Prior to their trial on racketeering and extortion charges, defendants Gaetano Vastola, Elias Saka, and their co-defendants moved, *inter alia,* to suppress certain electronic surveillance tapes contending that the tapes had not been sealed "immediately" as required by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Wiretap Act"), as amended, at 18 U.S.C. § 2510 *et seq.* Relying upon the opinion of the Court of Appeals for the Third Circuit in *United States v. Falcone,* 505 F.2d 478 (3d Cir. 1974), *cert. denied,* 420 U.S. 955 (1975), the court denied the motion to suppress. This case is now before the court upon remand from the Third Circuit for the court to determine, in light of the Supreme Court's decision in *United States v. Ojeda Rios,* 110 S.Ct. 1845 (1990), whether the government is now free to offer an explanation for its delay in sealing intercepted communication tapes as required by the Wiretap Act. If the court determines that the government should be able to offer a reason for the sealing delay, the court must evaluate the explanation offered to determine whether it was the *actual* reason for the delay, and, if so, whether the *actual* reason constitutes a *satisfactory* explanation of why the sealing delay occurred.

II. FACTS AND PROCEDURE

The extensive factual and procedural history of this complex case has been set forth in several reported

opinions, commencing with this court's opinion on defendants' pretrial omnibus motion in which the court, *inter alia*, denied defendants' motion to suppress certain electronic surveillance tapes, *United States v. Vastola*, 670 F. Supp. 1244 (D.N.J. 1987) ("*Vastola* I"), the decision of the Third Circuit essentially affirming the convictions of Vastola and Saka,[1] *United States v. Vastola*, 899 F.2d 211 (3d Cir. 1990) ("*Vastola* II"), and the decision of the Third Circuit remanding the case to this court in light of the Supreme Court's opinion in *Ojeda Rios*, *United States v. Vastola*, 915 F.2d 865 (3d Cir. 1990) ("*Vastola* III"). Rather than reiterate the lengthy history of this matter, the court will only address the facts and procedure relevant to the issue to be addressed on remand.

Vastola and Saka were indicted along with 19 other defendants for a variety of crimes. The counts against Vastola and Saka charged them with racketeering in violation of 18 U.S.C. § 1962 and extortion in violation of 18 U.S.C. § 894. The 21 defendants jointly filed an omnibus motion on a plethora of issues prior to trial. Among the relief sought by defendants was the suppression of 185 electronic surveillance tapes obtained from the government's surveillance of the Video Warehouse in West Long Branch, New Jersey, between March 15, 1985 and May 31, 1985. The West Long Branch Video Warehouse tapes were relevant to the government's case against Vastola and Saka as the Video Warehouse was the headquarters of their racketeering enterprise. Defendants contended that

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[1] The Third Circuit reversed this court on two counts concerning Vastola, but affirmed the remainder of Vastola's and Saka's convictions.

the 185 tapes should be suppressed pursuant to the Wiretap Act, 18 U.S.C. § 2518(8)(a), as they were not sealed until July 15, 1985, which was 45 days after the final interception at the West Long Branch Video Warehouse location on May 31, 1985, and 32 days after the June 13, 1985 expiration date of the order authorizing that surveillance. Two of those tapes are no longer relevant to this proceeding.[2]

The West Long Branch Video Warehouse surveillance commenced when the District Court of New Jersey authorized the interception of wire and oral communications at that location on March 15, 1985. Authorization for that surveillance was extended on April 16, 1985, and again on May 14, 1985. The order authorizing surveillance at that location expired on June 13, 1985, and interception at that location ceased on May 31, 1985 when the Video Warehouse moved to a different premises in Neptune City, New Jersey. On June 26, 1985, the District Court authorized the government to continue surveillance of the Video Warehouse at its new location.

On July 15, 1985, the government presented 183 tapes from the West Long Branch Video Warehouse for sealing. This sealing was untimely under the Wiretap Act. *Vastola* III, 915 F.2d at 875 ("We conclude that a sealing delay

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[2] It was later discovered that due to a clerical error two of the 185 tapes were not sealed until August 19, 1986, well over a year after the termination of the surveillance at the West Long Branch Video Warehouse. As the Third Circuit ruled that a satisfactory explanation has been offered for the sealing delay of those two tapes, *Vastola* III, 915 F.2d at 875 n.17, the court need only concern itself with the 183 tapes sealed on July 15, 1985.

indeed occurred as the West Long Branch tapes should have been sealed either as soon as was practical after May 31, 1985, when the actual surveillance ended, or as soon as practical after June 13, 1985, when the final extension order expired." (footnote omitted)).

In considering the defendants' motion to suppress the West Long Branch Video Warehouse tapes because the government had failed to provide a satisfactory explanation for the sealing delay, this court relied upon *Falcone*, 505 F.2d at 484, which held that suppression is not an appropriate remedy for a delay in sealing electronic surveillance tapes unless it can be shown that the physical integrity of the tapes was compromised. As the government demonstrated by clear and convincing evidence that the physical integrity of the tapes had been maintained, this court denied defendants' motion to suppress. *Vastola* I, 670 F. Supp. at 1282. In that same opinion, the court severed the trial of defendants into different groups. *Vastola* I, 670 F. Supp. at 1261. Vastola and Saka were tried together, and the jury found them guilty of various racketeering and extortion charges.

Upon appeal to the Third Circuit, the Third Circuit reversed this court in certain respects, but essentially affirmed the judgments of conviction for both defendants. Vastola and Saka raised the sealing issue in their appeal, but the Third Circuit rejected their arguments, merely noting that this court's decision denying suppression of the tapes in question was in line with *Falcone*. *Vastola* II, 899 F.2d at 239. n.33.

On June 25, 1990, the Supreme Court vacated the judgment of the Third Circuit affirming most of Vastola's

and Saka's convictions, and remanded this case to the Third Circuit for further consideration in light of *United States v. Ojeda Rios*, ___ U.S. ___, 110 S.Ct. 1845 (1990). In *Ojeda Rios*, the Supreme Court expressly overruled *Falcone*, and held that suppression is required when the government fails to offer a "satisfactory explanation" for a delay in sealing authorized electronic surveillance tapes in accordance with 25 U.S.C. § 2518(8)(a). *Ojeda Rios*, ___ U.S. at ___, 110 S.Ct. at 1850 n.5. The government must "explain not only why a delay occurred but also why it is excusable." *Ojeda Rios*, ___ U.S. at ___, 110 S.Ct. at 1850. The government's explanation for the delay is "satisfactory" only when it is the actual reason for the delay, *Ojeda Rios*, ___ U.S. ___, 110 S.Ct. at 1852 (Connor, J., concurring), and is objectively reasonable at the time of the sealing delay. *Ojeda Rios*, ___ U.S. ___, 110 S.Ct. at 1851.

On remand before the Third Circuit, the government offered four arguments, First, it contended that the June 26, 1985 order authorizing electronic surveillance at the Neptune City Video Warehouse could be construed as an extension of the orders authorizing surveillance at the West Long Branch Video Warehouse, and as an extension of the earlier orders, there was no sealing delay as its obligation to seal did not arise under the Wiretap Act until the interception at the Neptune City Video Warehouse ceased. Second, even if the June 26, 1985 order could not be characterized as an extension of the West Long Branch Video Warehouse orders, the attorneys in charge of the electronic surveillance reasonably believed, based on precedent at the time of the taping, that under the Wiretap Act the sealing obligation did not arise until

the conclusion of the entire Videotape Warehouse investigation. Hence, the government asked the Third Circuit to find that the government had furnished a "satisfactory explanation" for the sealing delay. Third, the government contended that the Third Circuit need not resolve the sealing issue as without the West Long Branch Video Warehouse tapes, there would still be sufficient information to sustain Vastola and Saka's convictions. Finally, the government asked the Third Circuit to remand for further inquiry as to the reason for the delay if the Third Circuit could not at that juncture reinstate Vastola and Saka's convictions. *Vastola* III, 915 F.2d at 873-74.

Vastola and Saka vigorously contested the government's assertions, and contended that the government should not be free to offer any explanation for the sealing delay as it had failed to offer an explanation at the time of the motion to suppress. In addition, they argued that there was no basis in fact for the government's argument that the June 26, 1985 order authorizing the Neptune City Video Warehouse surveillance was an extension of the earlier orders authorizing the West Long Branch Video Warehouse surveillance, and that traditional notions of waiver should bar the government from offering such an explanation as the government had argued at the time of the original suppression motion that a delay had occurred but *Falcone* did not require the tapes' suppression.

After considering the arguments of the government and the defendants, the Third Circuit remanded the matter to this court. The Third Circuit rejected outright the government's first argument that the June 26, 1985 order

authorizing interception at the Neptune City Video Warehouse was an extension of the prior orders authorizing surveillance at the West Long Branch Video Warehouse, stating that "the statute unambiguously rules out this possibility." *Vastola* III, 915 F.2d at 874 (footnote omitted). With respect to the government's second argument, the Third Circuit found on the record before it that it could not accept the government's argument that the government had already offered a satisfactory explanation for the sealing delay, namely that the attorneys in charge of the surveillance did not believe that their sealing obligations under the statute arose until after the investigation was complete. *Vastola* III, 915 F.2d at 875. The Third Circuit did not reach the government's third argument that the admission of the tapes constituted harmless error. *Vastola* III, 915 F.2d at 876. Instead, it remanded this matter to this court to determine whether the government is now free under *Ojeda Rios* to offer an explanation for the sealing delay, and if so, to hear evidence as to the actual reason for the delay. *Vastola* III, 915 F.2d at 876.

Without deciding whether or not the government should be permitted to offer an explanation, the court conducted a hearing on December 14, 1990 at which the government presented evidence as to the actual reason for the sealing delay.[3] Despite defendants' objections, the

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[3] Defendant Dominick Canterino sought to join defendants Vastola and Saka at the proceedings before this court on remand. Without deciding whether Canterino was entitled to participate, the court allowed him to participate at the December 14, 1990 hearing. In an order dated May 20, 1991, the court determined that Canterino was not entitled to participate in the proceedings upon remand as he had not raised the issue of the

court heard the testimony offered by the government in order to expedite these proceedings in case the court determined that the government should be permitted to offer an explanation for the sealing delay.[4]

III. DISCUSSION

The Wiretap Act provides in pertinent part that "[i]mmediately upon the expiration of the period of the order, or extensions thereof, such recordings [of intercepted electronic communications] shall be made available to the judge issuing such order and sealed under his directions." 25 U.S.C. § 2518(8)(a). The Act further provides that, "[t]he presences of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom . . . " 25 U.S.C. § 2518(8)(a). As the Third Circuit held that there was a delay in the sealing of the West Long Branch Video Warehouse tapes, and that it could not on the record before it rule that the government had offered a satisfactory explanation for the delay, *Vastola* III, 915 F.2d at

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sealing delay in his appeal to the Third Circuit and because the new rule announced in *Ojeda Rios* did not apply to defendant Canterino pursuant to *Lane v. Teague*, ___ U.S. ___, 109 S.Ct. 1060 (1989), as his judgment was final at the time of the *Ojeda Rios* decision.

[4] The court in *United States v. Gallagher* similarly heard the government's evidence prior to determining whether it should consider that evidence in order to create a complete record for appeal. *Gallagher*, 751 F. Supp. 481, 484 (D.N.J. 1990).

874-75, this court must determine whether the government is entitled to offer an explanation for the sealing delay at this time.

A. SHOULD THE GOVERNMENT BE PERMITTED TO OFFER AN EXPLANATION FOR THE SEALING DELAY?

Vastola and Saka essentially make two arguments against permitting the government to offer an explanation for the sealing delay at this time. The court will address each argument in turn.

First, defendants contend that at the time they moved to suppress the tapes, the government should have offered an explanation for the sealing delay. Instead, the government merely asserted: "It is clearly the law in this circuit that a delay in sealing tapes is not, in and of itself, sufficient grounds for suppression as long as the integrity of the tape recordings is preserved. *United States v. Falcone*, 505 F.2d at 484." Government's June 18, 1987 Brief in Opposition to Defendant's Motion to Suppress the Fruits of Electronic Surveillance at 110. Defendants claim that *Falcone* did not mitigate the requirement of 25 U.S.C. § 2518(8)(a) which compels the government to offer a "satisfactory explanation" for a sealing delay, and that the government's failure to offer any reason for the sealing delay in 1987 precludes it from doing so at this time.

Defendants raised the same argument before the Third Circuit. The Third Circuit found "that [the government's] failure in the district court to offer evidence concerning the circumstances of the sealing delay should

not necessarily now foreclose it from offering such evidence before the district court." *Vastola* III, 915 F.2d at 875. In that opinion, the Third Circuit noted that this court could find that any reliance the government placed on *Falcone* was not unreasonable, particularly as the government correctly predicted that the Third Circuit would adhere to that decision. *Vastola* III, 915 F.2d at 876. The Third Circuit directed this court to exercise its discretion as to whether to allow the government to present evidence on the sealing delay, likening the instant situation to a motion of the government to reopen, citing *United States v. Blankenship*, 775 F.2d 735, 740-41 (6th Cir. 1985). *Vastola* III, 915 F.2d at 876.

In *United States v. Gallagher*, 751 F. Supp. 481 (D.N.J. 1990), the court had the opportunity to decide whether or not it should exercise its discretion to permit the government to present evidence concerning its reasons for the sealing delay in that case. After analyzing the *Blankenship* factors, the *Gallagher* court concluded "that the government should be permitted to give evidence disclosing the reasons for the delay in sealing the pertinent tapes and addressing the question of whether the delay was excusable." *Gallagher*, 751 F. Supp. at 486. The court found that the government's application to introduce the evidence was timely as there was no reason to introduce the evidence at the original suppression hearing as pursuant to *Falcone* the motion to suppress could be determined without such evidence. *Gallagher*, 751 F. Supp. at 486. It further found that the reason the government did not present this evidence at the suppression hearing as was "that under the then-prevailing law in this circuit the evidence was unnecessary for a resolution of the motion, a legitimate

reason." *Gallagher*, 751 F. Supp. at 486. Finally, the court concluded that the proffered evidence, which was testimonial and documentary, would not prejudice defendants' case. *Gallagher*, 751 F. Supp. at 486.

As did the *Gallagher* court, this court finds that after considering the *Blankenship* factors, the government's failure to present evidence concerning the reason for the sealing delay at the time of the suppression hearing does not bar it from presenting such evidence at this time. The law in the Third Circuit was clear prior to *Ojeda Rios* – in order to defeat a motion to suppress electronic surveillance tapes, the government only needed to demonstrate that the integrity of the tapes had been maintained. While that rule has been changed by *Ojeda Rios*, it was the rule under which this court and the government operated in 1987 when defendants' motion was denied. To prohibit the government from offering an explanation concerning the sealing delay as it did not present its explanation at the time of the suppression motion would be grossly unfair as *Falcone* did not require the presentation of such evidence to defeat the motion to suppress.

This conclusion, however, does not decide the issue as defendants make a second argument. They assert that the government should be barred from offering an explanation for the sealing delay due to the allegedly contradictory positions the government has taken concerning that delay at various stages of this litigation. Vastola and Saka contend that the government conceded that a delay occurred at the time of suppression motion and during the first appellate argument before the Third Circuit, but that upon remand to the Third Circuit the government for the first time presented its argument that the June 26,

1985 order authorizing electronic surveillance at the Neptune City Video Warehouse was an extension of the earlier orders authorizing electronic surveillance at the West Long Branch Video Warehouse. The Third Circuit upon remand rejected the government's argument that the June 26, 1985 order was an extension of the earlier orders. *Vastola* III, 915 F.2d at 875. The government also contended upon that it had already offered a satisfactory explanation for the sealing delay but the Third Circuit found that it could not accept that argument at that time "on the record before [it] . . . " *Vastola* III, 915 F.2d at 875. Defendants claim that the government should not now be free to offer "a new or improved explanation" after the Third Circuit rejected its extension argument and its argument that a satisfactory explanation had already been given. *See* Defendants' Memorandum of Law on Remand at 22. Vastola and Saka posit that traditional notions of waiver coupled with Justice O'Connor's cautionary note in her concurrence in *Ojeda Rios* that the "satisfactory explanation" must be "the actual reason for the delay . . . not a *post hoc* explanation given for the first time on appeal" mandate that the government be barred from introducing evidence as to the actual reason for the sealing delay.

The court does not read Justice O'Connor's concurrence in *Ojeda Rios* so narrowly as to prohibit the government from introducing evidence concerning the actual reason for the sealing delay at this time. It must be recalled that the Second Circuit, prior to the Supreme Court's decision in *Ojeda Rios*, required the government to present a "satisfactory explanation" for the sealing delay. Hence, at the time of the original suppression

motion in *Ojeda Rios,* an explanation had to note offered to the district court. Justice O'Connor's cautionary note merely directed the Court of Appeals to evaluate carefully any explanation offered in that forum to ensure that it comported with the explanation offered below. In this case, this court neither sought nor did it hear any evidence concerning the sealing delay at the time of the suppression motion as *Falcone* did not require the presentation of such evidence.

After considering the government's original brief in opposition to the motion to suppress, the proceedings on direct appeal including the partial transcript of oral argument provided to the court by defendants, and the government's brief upon remand to the Third Circuit, this court does not find that the government waived its right to present evidence concerning the reason for the delay. This forum is the only one in which the government has been [sic] which is competent to hear evidence of the actual reason for the sealing delay. As discussed *supra,* no explanation for the delay was required by *Falcone* at the time this court resolved the motion to suppress the tapes. Upon remand to the Court of Appeals, the Third Circuit could not hear for the first time what the government's reason for the sealing delay was; that court's review is constrained to the record before it. This is the first time that the government has been afforded the opportunity to present evidence on this issue as this court did not expect such evidence at the time of the sealing delay given the rule in *Falcone.* The government recognized the need to develop the record more fully when it asked the Third Circuit to remand this matter to this court. As a result, the court finds that the government has not waived its

right to present evidence as to the actual reason for the delay, and will consider the government's explanation at this time.

B. TESTIMONY PRESENTED BY THE GOVERNMENT AS TO THE ACTUAL REASON FOR THE SEALING DELAY

The court conducted a hearing on the actual reason for the sealing delay on December 14, 1990. At that hearing, the government offered the testimony of two witnesses, Thomas Roth and Diana Armenakis, the two assistant United States Attorneys most integrally involved in the electronic surveillance of the West Long Branch and the Neptune City Video Warehouse.

Thomas Roth left the United States Attorney's Office in New Jersey in September of 1987 to engage in the private practice of law. At the time of his departure from the Office, he was the First Assistant United States Attorney in New Jersey. December 14, 1990 Transcript ("Transcript") at 7. Prior to that, Roth was the Chief of the Criminal Division of the United States Attorney's Office. At the time of the events relevant to this matter, January 1985 – August 1985, he was the Deputy Chief of the Criminal Division and the Chief of Narcotics in the United States Attorney's Office. Transcript at 8. Within the Criminal Division of the United States Attorney's Office in New Jersey, Roth had the most experience with interceptions pursuant to the Wiretap Act, although everyone in the Strike Force would have had equivalent or greater experience than Roth. Transcript at 9.

Roth was involved in the investigation involving electronic surveillance at the Video Warehouse in a Supervisory capacity. Transcript at 8. He testified at the Assistant United States Attorney primarily responsible for the electronic surveillance was Diana Armenakis. Transcript at 8.

Roth's understanding of the sealing requirement of 18 U.S.C. § 2518 was "that sealing was required at the termination of interceptions. I had always understood that to mean the termination of all interceptions relating to a specific investigation." Transcript at 10, 17. While he believed that the law did not require sealing before the termination of all interceptions relating to the same investigation, he though the more prudent course would be to seal the tapes when each facility was terminated. Transcript at 12. His understanding of the sealing requirement under the Wiretap Act was based principally on his reading of the statute and the law. Transcript at 14-15.

Prior to his tenure at the United States Attorney's Office in New Jersey, Roth worked as an Assistant United States Attorney in the Eastern District of New York from 1979-1982. Transcript at 13. He was involved in three electronic surveillance investigations during that time. Transcript at 14. He did not recall any particular cases that he read concerning sealing. Transcript at 21-23, 33.

When Roth was at the United States Attorney's Office in the Eastern District of New York, it was not his practice to wait until the termination of all the interceptions in a case he was supervising to seal the intercepted communications. Transcript at 30. He explained that when he was a new Assistant in the Eastern District, he

would seal monthly even if he had an extension order. Transcript at 30. Later, when he became more comfortable with the procedure, he would seal whenever a particular facility was terminated. Transcript at 30. He did so in the Eastern District of New York because he "was a relatively new assistant and [he] was going to take the ultra caution [sic] approach no matter what the case law said." Transcript at 31.

The government's other witness was Diana Armenakis who was in charge of the electronic surveillance at Video Warehouse. She was an Assistant United States Attorney in New Jersey from 1980-1985. At the United States Attorney's Office, she worked primarily on hijacking and bank robbery cases. Transcript at 38. Armenakis worked on only one electronic surveillance case, that involving the electronic interceptions at Video Warehouse. Transcript at 39. During this case, Roth acted as Armenakis's supervisor. Transcript at 49. When she had issues to discuss or problems, Armenakis would go to Roth to discuss them. Transcript at 52.

The electronic surveillance at Video Warehouse commenced in March of 1985, and was extended in both April and May. Transcript at 40. Armenakis prepared the first application, affidavit and order for the electronic surveillance at the West Long Branch Video Warehouse which was signed by Judge Debevoise on March 15, 1985. Transcript at 53-54. She prepared seven day reports for Judge Debevoise during the period of the order, advising him of the results of the wiretapping. Transcript at 55.

On April 16, 1985, Judge Ackerman signed an order authorizing the continued electronic surveillance at the

West Long Branch Video Warehouse. Transcript at 56. Armenakis again prepared the application, affidavit and order for the electronic surveillance. *See* Transcript at 58. On the face of the April 16, 1985 order, she captioned the document, "Order" and below that, she wrote "Extension." Transcript at 57-58. The language in the March 15, 1985 application said "to intercept" while the language in the April 16, 1985 application said "to continue to intercept." Transcript at 59.

Armenakis prepared a third application, affidavit and order, which was signed by Judge Ackerman on May 14, 1985. Transcript at 59. On the face of the May 14, 1985 order, Armenakis wrote, "Second Extension." Transcript at 62. At some point, Armenakis learned that Video Warehouse was to change locations, and it did in fact change locations. Transcript at 40-41. Interception at the West Long Branch Video Warehouse actually ceased on May 31, 1985 although the order authorizing interception did not expire until June 13, 1985. Transcript at 40, 63. It was Armenakis' intention to continue to intercept at Video Warehouse's new location in Neptune City. As a result, she applied to the Justice Department in Washington, D.C. to approve an authorization to continue interception at the new Video Warehouse location at the end of May. Transcript at 41. After a period of time longer than she anticipated, Washington authorized the interception on June 26, 1985. Transcript at 41-42.

Armenakis prepared an application, affidavit and order to obtain authorization to engage in electronic surveillance at the new Video Warehouse location in Neptune City which was signed by Judge Lacey on June 26, 1985. Transcript at 66-67. The face of the June 26th order

did not contain the words extension, second extension or third extension. Transcript at 67-68. The June 26, 1985 order contained a new target, Ideal Distributors, and a new premises for Video Warehouse. Transcript at 68. While Armenakis felt the June 26, 1985 order was an extension of the previous order for Video Warehouse, she did not so caption the June 26, 1985 order as the order also served as an original electronic surveillance order for Ideal Distributors. Transcript at 84-85. She thought labeling the order as an extension would be took confusing due to the addition of Ideal Distributors. Transcript at 84-85.

Armenakis prepared another application, affidavit and order to continue interception at the Neptune City Video Warehouse which was signed by Judge Fisher on July 26, 1985. Transcript at 73-74. She remained in charge of the case until early August, 1985, when she was removed for obtaining an order for wiretapping which had not been cleared through the Department of Justice. Transcript at 50. The incident involved the July 26, 1985 extension order authorizing continued interception at the Neptune City Video Warehouse. Armenakis prepared the application for that order and signed it under oath. In the paperwork, Armenakis indicated that she had received Department of Justice authorization for the electronic surveillance which she had not obtained. Transcript at 51, 74.

Armenakis' understanding of the sealing requirement under the Wiretap Act "was that when the investigation was completed that you immediately sealed whatever tapes had been obtained." Transcript at 42-43;

see Transcript at 75, 76-78. She obtained this understanding by studying "the statute and several of the annotations. I spoke with other more experienced attorneys in the office on wiretaps and it was . . . my understanding which appeared to be consistent throughout the office." Transcript at 43, 77-79. When she "began the investigation, [she] outlined the statute and [she] read relevant annotations." Transcript at 81-82. While at the United States Attorney's Office, Armenakis was given a manual to review and maintain, *Proving Federal Crimes* which contained some information on electronic surveillance; however, she was given no specific training in that area. Transcript at 47, 48-49. She did not recall reviewing any particular guidelines, instructions, manuals, treatise, or cases with regard to her sealing obligation with the West Long Branch Video Warehouse premises although she "was reviewing documents all the time." Transcript at 74-75; 48-49.

Even though it was not the completion of the investigation, and she understood that sealing was not required until the completion of the investigation, Armenakis prepared the necessary paperwork to have the West Long Branch Video Warehouse tapes sealed on July 15, 1985. Transcript at 43-44, 45. She sealed the tapes as a housekeeping matter after the F.B.I. Custodian of the tapes mentioned to the agent on the case, John Mahoney, that the F.B.I. numbers on the tapes had changed due to the new Video Warehouse location. Transcript at 43-44. She discussed this with other Assistants who suggested it would be appropriate under the circumstances to seal the tapes. Transcript at 87. Armenakis then made the decision to seal the tapes at that time since they were not going to

be using those particular F.B.I. numbers any more. Transcript at 44. The tapes were sealed as a matter of convenience. Transcript at 45. No one suggested to her that she needed to get the tapes sealed. Transcript at 87.

C. THE COURT'S FINDING AS TO THE ACTUAL REASON FOR THE SEALING DELAY

Roth and Armenakis testified that the West Long Branch Video Warehouse tapes were not sealed earlier than July 15, 1985 as they believed that they were not obligated to seal tapes under the Wiretap Act until the conclusion of the entire Video Warehouse investigation. While July 15, 1985 was not the end of the entire investigation, Armenakis testified the tapes were sealed at that time as a housekeeping matter.

Defendants point to § 9-7.340 of the United States Attorneys' Manual which states, "*[i]mmediately* upon termination of the interception, the original recordings of the conversations should be submitted by the supervisory attorney to the judge authorizing the interception. . . . " (emphasis in original) in support of their contention that Roth and Armenakis' testimony cannot be credible given the language of the manual. The court notes that the term "interception" is capable of interpretation as a singular or as a plural. If interpreted as a plural, Roth and Armenakis' interpretation that the tapes did not have to be sealed until the termination of the Video Warehouse interception (including the Neptune City interception of Video Warehouse) is not borne out by the manual. The

court finds that the language contained within the manual does not call into question the credibility of Roth and Armenakis.

Defendants also direct the court's attention to the fact that Armenakis did not label the June 26, 1985 order "Third Extension" in support of their argument she did not believe that the June 26, 1985 order was an extension of the previous orders authorizing interception at the West Long Branch Video Warehouse. The court finds that Armenakis' explanation of why she did not label the June 26, 1985 order authorizing the continued electronic surveillance of Video Warehouse at the Neptune City location "Third Extension" – that Ideal Distributors was added to that order and to so label the order would be confusing – is credible, and rejects defendants' argument.

After considering the testimony of the witnesses, and the voluminous exhibits submitted by defendants, the court finds that the actual reason for the sealing delay was that the Assistant United States Attorney in charge of the electronic surveillance, Diana Armenakis, and her supervisor on the case, Thomas Roth, believed that the Wiretap Act did not require sealing until the end of the entire investigation. The tapes were sealed prior to the end of the entire investigation as a matter of convenience. This conclusion is supported by the direct testimony of the witnesses which the court finds to be credible.

Now that the court has determined the actual reason for the sealing delay, it must consider whether the government has established whether the actual reason was objectively reasonable at the time of the delay in 1985.

D. WAS THE ACTUAL REASON FOR THE SEALING DELAY OBJECTIVELY REASONABLE?

Roth and Armenakis' understanding of the sealing requirements under the Wiretap Act has been borne out by the Third Circuit's opinion in *Vastola* III. Nevertheless, the court must determine whether their interpretation of the statute was objectively reasonable in 1985. If so, the court did not err in admitting the West Long Branch Video Warehouse tapes at trial.

Defendants direct the court to treatises on electronic surveillance by Clifford S. Fishman, *Wiretapping and Eavesdropping*, and James Carr, *The Law of Electronic Surveillance*, in support of their contention that Roth and Armenakis's [sic] view was not objectively reasonable. At the hearing, Roth testified that he ordered the Fishman and Carr treatises for the New Jersey United States Attorney's Office *in 1986 or 1987*, Transcript at 29, and Armenakis testified that she did not recall referring to any particular treatises during this case. Transcript at 20. The court finds that those treatises were not in the New Jersey United States Attorney's Office in 1985. The court cannot hold that the attorneys' failure to consult those treatises was unreasonable as both testified that they had read the statute and the applicable case law.

Defendants point to *United States v. Vazquez*, 605 F.2d 1269, 1278 (2d Cir. 1979), *United States v. Scafidi*, 564 F.2d 633, 641 (2d Cir. 1977), and *United States v. Fury*, 554 F.2d 522, 533 (2d Cir. 1977) to demonstrate that Roth and Armenakis' view of when they were obligated to seal the tapes under the Wiretap Act was unreasonable. While

these cases may have made the law appear clear to defendants, the court finds that in 1985 the law as not settled, and that case law existed to support Roth and Armenakis' view. For example, in *United States v. Harvey,* the court wrote, "Case law clearly holds that the tapes do not have to be sealed until the end of the extension orders, i.e., *at the termination of the entire surveillance.*" *United States v. Harvey,* 560 F. Supp. 1040, 1057 (S.D. Fla. 1982), citing *United States v. Scafidi,* 564 F.2d 633, 641 (2d Cir. 1977) and *United States v. Vazquez,* 605 F.2d 1269, 1275-76 (2d Cir. 1979) (emphasis added). In addition, in both *Ojeda Rios* and *Gallagher,* the government presented reasons similar to the reason presented by Roth and Armenakis in this case for the sealing delay. As the *Gallagher* court so aptly put:

> The Supreme Court noted two Second Circuit cases which, while not establishing that the supervising attorney's view was correct, did 'support the conclusion that the "extension" theory now pressed upon us was objectively reasonable at the time of the delays.' [*Ojeda Rios*] at 1851. The cases to which the Supreme Court referred were *United States v. Principie,* 531 F.2d 1132 (2d Cir. 1976), *cert. denied,* 430 U.S. 905, 97 S.Ct. 1173, 51 L.3d.2d 581 (1977) and *United States v. Scafidi,* 564 F.2d 633 (2d Cir. 1977), *cert. denied,* 436 U.S. 903, 98 S.Ct. 2231, 56 L.Ed.2d 400 (1978).
>
> The Second Circuit and Third Circuit are in close geographical proximity and in view of the fact that each of these Circuits includes a part of the greater New York City Area their law enforcement efforts often overlap and require

> continuing cooperation. . . . Second Circuit opinions in the field of criminal law, as well as in a number of other fields, have a significant influence where there is no Third Circuit authority. Thus the existence of the *Principie* and *Scafidi* opinions have a similar effect in this case as they had in [*Ojeda*] *Rios*.
>
> In [*Ojeda*] *Rios* the Supreme Court held that in light of those cases the supervising attorney's view of the sealing requirement was objectively reasonable . . . By the same token I conclude that Robins' view, though wrong, was objectively reasonable . . .

Gallegher, 751 F. Supp. at 495.

The sealing delay in *Gallagher* took place in 1982, and the sealing delay in *Ojeda Rios* took place in 1984. This court has been unable to discern any significant development in the law of electronic surveillance sealing which occurred between 1984, the date of the sealing delay in *Ojeda Rios*, and the time of the sealing delay in this case in 1985 which would have made Roth and Armenakis' view that sealing was required only at the end of the investigation objectively *unreasonable*. There certainly was no law in the Third Circuit to the contrary that this court was uncovered or the defendants presented in support of their argument that the attorneys' view was objectively unreasonable. As did the court in *Ojeda Rios*, 110 S.Ct. at 1851, and the court in *Gallagher*, 751 F. Supp. at 495, this court finds that Roth and Armenakis' interpretation of the statute was objectively reasonable at the time of the sealing delay. So finding, the court must also find that the government has offered a "satisfactory explanation" for the sealing delay as required by the Wiretap Act. Hence,

the court properly admitted the electronic surveillance at trial.

IV. CONCLUSION

For the above stated reasons, the court will reinstate the convictions of defendant Gaetano Vastola as to Count 1, Count 3, and Count 4 and Count 9 of the redacted superceding [sic] indictment, and reinstate the convictions of Elias Saka as to Count 1, Count 2, Count 3, Count 4, Count 6, Count 7, Count 9, Count 12, Count 13, Count 14, Count 15, Count 16, Count 17, Count 18, Count 19, Count 20, Count 21, Count 22, Count 23, Count 24, Count 25, and Count 26, of the redacted superceding [sic] indictment.

The court will enter an appropriate order.

/s/ _____
STANLEY S. BROTMAN
UNITED STATES
DISTRICT JUDGE

Dated: August 15, 1991

APPENDIX VII

UNITED STATES of America,

v.

Gaetano VASTOLA, a/k/a "Tommy," a/k/a "Corky," a/k/a "The Galoot," a/k/a "The Big Guy," Palmer Brocco, a/k/a "Sonny," Nicholas John Massaro, Jr., Rudolph Farone, Larry Martire, Elias Saka, a/k/a "Lew," Benjamin Stone, George Santoni, Thomas Zito, a/k/a "Mr. Gordon," a/k/a "Tommy Russo," Charles Majuri, Dominick Canterino, Morris Levy, Howard Fisher, Alexander D'Alessio, Sr., a/k/a "Pope," Alexander D'Alessio, Jr., a/k/a "Popie," John Brennan, a/k/a "Jack," Barry Harris, Bruce Howard, Daniel Marino, Paul Sanzaro, and Vincent Uris, a/k/a "Butch", Defendants.

Crim. A. No. 86-301(SSB).

United States District Court,
D. New Jersey.

Sept. 1, 1987.

Office of the U.S. Atty. by Bruce Repetto, Andrew T. Baxter, Asst. U.S. Attys., Newark, N.J., for U.S.

Michael Rosen, New York City, for defendant Vastola.

Ryan, Pedicini & Donnelly by Rita Donnelly, West Orange, N.J., for defendant Brocco.

Joshua Markowitz, Lawrenceville, N.J., for defendant Massaro.

DeCotiis, Frino & Lundstein by William R. Lundstein, Roseland, N.J., for defendant Farone.

Cathy Waldor, Montclair, N.J., for defendant Martire.

Lyle Hough, Trenton, N.J., for defendant Saka.

Office of the Federal Public Defender by Richard Coughlin, Asst. Federal Public Defender, Camden, N.J., for defendant Stone.

Tomar, Seliger, Simonoff, Adourian & O'Brien by Charles N. Riley, Haddonfield, N.J., for defendant Santoni.

Barry Schulman, Brooklyn, N.Y., for defendant Zito.

Raymond R. Beam, Jr., Bloomfield, N.J., for defendant Majuri.

Michael B. Pollack, New York City, for defendant Canterino.

Michael Querques, Orange, N.J., for defendant Levy.

Leon Borstein, New York City, for defendant Fisher.

Cariddi & Garcia by Anthony Cariddi, Hackensack, N.J., for defendant D'Alessio, Sr.

Louis Settè, Ridgewood, N.J., for defendant D'Alessio, Jr.

David L. Rhodes, Lawrenceville, N.J., for defendant Brennan.

Jack Urscheler, Fort Lee, N.J., for defendant Harris.

Robert A. Farkas, Trenton, N.J., for defendant Howard.

Brown & Connery by William M. Tambussi, Westmont, N.J., for defendant Marino.

Ken Lange, Bay Harbor, Fla., for defendant Sanzaro.

Julian DeAngeli, Lawrenceville, N.J., for defendant Uris.

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OPINION

BROTMAN, District Judge:

I. INTRODUCTION

Presently before the court are a voluminous set of pretrial motions. Oral argument was heard on the *Brady* motion of defendants Levy and Fisher on June 12, 1987, and the remainder of the motions were argued on July 10, 1987. This case is based on a 114-count indictment naming 21 defendants. Ten defendants are named in counts alleging violations of the Racketeering Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 *et seq.* Count 1 alleges a § 1962(c) violation based on a "pattern of racketeering activity." Count 2 alleges a § 1962(c) violation based on "collection of unlawful debt." These two -

counts are referred to throughout the opinion as substantive RICO counts. Count 3 alleges a § 1962(d) violation based in a RICO conspiracy. This count is referred to as the RICO conspiracy count. The remaining counts fall into the following categories of criminal activity: narcotics, usury and extortion, mail ("bust-out") fraud, wire ("Western Union") fraud, copyright (video "bootlegging") fraud, insurance fraud, bankruptcy fraud, gambling, and firearms

The pretrial motions are grouped into categories and discussed in parts II-V of this opinion: Part II, motions to dismiss, to strike, and to force the government to elect between charged offenses and counts; Part III, motions to sever; Part IV, motions for pretrial hearings and discovery; and Part V, motions to suppress. The order follows the opinion.

II. MOTIONS TO DISMISS, TO STRIKE AND TO FORCE THE GOVERNMENT TO ELECT BETWEEN CHARGED OFFENSES AND COUNTS

A. Defendants' Joint Motion to Dismiss Counts 1 and 3; or in the Alternative to Dismiss Acts 1, 17, 18, and Count 1, ¶5 Because Multiple Conspiracies are Plead as Predicate Acts

Defendants move to dismiss counts 1 and 3 because they include conspiratorial acts as predicate offenses. This is allowed by the plain language of the statute. 18 U.S.C. § 1961(1). The government cites second circuit law endorsing this practice. *United States v. Ruggiero*, 726 F.2d 913, 923 (2d Cir.), *cert. denied*, 469 U.S. 831, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984); *United States v. Santoro*, 647 F.Supp.

153, 177-78 (E.D.N.Y.1986). It appears that the Third Circuit Court of Appeals has not directly faced the question. The defense asserts that third circuit law, under *Gomberg*, requires that such pleading not be allowed. *See United States v. Gomberg*, 715 F.2d 843 (3d Cir.1983). However, *Gomberg* is not squarely on point. It addresses a duplicity question and holds that a single conspiracy count can allege multiple crimes. 715 F.2d at 846. The alleged RICO conspiracy (count 3) has multiple objects contained in the pattern of racketeering and the collection of unlawful debt. At the trial the government will have to prove beyond a reasonable doubt that there existed a unified agreement to participate in the affairs of the "Vastola enterprise" through a pattern of racketeering or through the collection of unlawful debt. *See United States v. Boffa*, 513 F.Supp. 444, 475 (D.Del.1980). The multiple conspiracy doctrine requires that all RICO enterprises defendants be shown to have a nexus "which signals the existence of a truly unified agreement." *Id.* at 474; *see also* United States v. Smith, 789 F.2d 196, 200 (3d Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 668, 93 L.Ed.2d 720 (1986) (In commenting on a mail fraud conspiracy indictment, the court stated, "a finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance.") One district court judge in New Jersey has explicitly rejected the second circuit approach. *See United States v. Local, 560, Int'l Brotherhood of Teamsters*, 581 F.Supp. 279, 332 (D.N.J. 1984) ("I conclude that proof of a state of mind apart from that required for the commission of the predicate offenses must be demonstrated for each alleged conspirator.").

This court adopts the reasoning of *Teamsters*. If the evidence at trial shows unrelated multiple conspiracies, defendants will be entitled to acquittal on the RICO conspiracy charges. *Boffa*, 513 F.Supp. at 475 ("If the evidence offered at trial presents a variance in proof demonstrating multiple conspiracies, which affects the substantial rights of the defendants, they will be entitled to acquittal on Count I [RICO conspiracy count]."). Therefore, defendants' motion is denied without prejudice to renewal at the close of the government's case.

B. Defendants' Joint Motion to Compel the Government to Elect Between the Two Substantive RICO Counts (1 and 2)

Defendants seek an order requiring the government to elect between counts 1 and 2 because they are multiplicious. Count 1 alleges a violation of § 1962(c) on the basis of a "pattern of racketeering" and count 2 alleges a violation of § 1962(c) on the basis of a "collection of unlawful debt." Defendants argue in their joint brief that each count charges the same conduct as evidenced by application of the "same evidence" test. Memorandum of Law ("MOL") in Support of Defendants' Substantive Motions 61-63. In their reply brief, defendants shift their argument to one focusing on the "allowable unit of prosecution." Reply MOL In Support of Defendants' Substantive Motions 21-22. The court rejects both arguments and finds that counts 1 and 2 are not multiplicious.

" 'Multiplicity' is the charging of a single offense in several counts." 1 C. Wright, *Federal Practice and Procedure* Criminal 2d § 142 at 469. Count 1 alleges among other

predicate acts, certain extortionate acts under 18 U.S.C. § 892 (extortionate extension of credit and related conspiracy), and § 894 (extortionate collection of debt and related conspiracy). Count 2 alleges collection of unlawful debt. These counts do not charge the same criminal conduct. Extortion is defined in 18 U.S.C. § 1951(b)(2) as "the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence or fear. . . . " Unlawful debt is defined in pertinent part under RICO as "a debt . . . which is unenforceable under state or federal law in whole or in part as to principal or interest because of the laws relating to usury. . . . " 18 U.S.C. § 1961(6). The count 2 charge does not require proof of extortionate actions. In order to determine if these counts charge separate criminal conduct, one must inquire as to "whether proof of one offense charged requires an additional fact that proof of the other offense does not necessitate." *United States v. Carter,* 576 F.2d 1061, 1064 (3d Cir.1978); *see also Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). In the RICO context, a number of circuits have adopted a five-point test to determine if "pattern of racketeering" counts are multiplicious. *United States v. Ruggiero,* 754 F.2d 927, 932 (11th Cir.), *cert. denied,* 471 U.S. 1127, 105 S.Ct. 2661, 86 L.Ed.2d 277 (1985) (Counts are multiplicious if they involve: (1) same time period, (2) same place, (3) same persons, (4) same statutes, and (5) same nature and scope of activities.); *see also United States v. Russotti,* 717 F.2d 27, 33 (2d Cir. 1983), *cert. denied,* 465 U.S. 1022, 104 S.Ct. 1273, 79 L.Ed.2d 678 (1984); *United States v. Dean,* 647 F.2d 779 (8th Cir.), *modified on other grounds,* 667 F.2d 729 (8th Cir. 1982), *cert. denied,* 456 U.S.

1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982). It is clear that the nature of extortion activities requires a showing of additional proof to the showing required for unlawful debt collection activities.

Defendants argue in their reply brief that the "same evidence" test is not determinative and instead, point to the "allowable unit of prosecution" of § 1962(c). They assert that the unit is "the conduct of the enterprise." Reply MOL at 23. However, the court reads § 1962(c) as containing three elements. The first is a person associated with an enterprise, the second is an enterprise involved in interstate or foreign commerce, and the third is participation in such conduct through one of two prongs: a pattern of racketeering or collection of an unlawful debt. All three elements make up the unit of prosecution. *See generally United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981).

It appears that prosecutions under the unlawful debt provisions are rare. *United States v. Pepe*, 747 F.2d 632, 673 (11th Cir. 1984). However, prosecution of the same defendant in multiple counts under § 1962(c) alleging different patterns of racketeering has been allowed. *Ruggiero*, 754 F.2d at 931 ("Because of this separate [pattern of racketeering] element, an individual may be prosecuted for more than one violation of subsection § 1962(c) in connection with the same enterprise, so long as each violation involved a 'different pattern of racketeering activity.' ") (citations omitted). One court has noted *in dicta* that stating an unlawful debt charge and a pattern of racketeering charge in separate counts would be acceptable. *Pepe*, 747 F.2d at 659. This court finds that the pattern of racketeering charge and the unlawful debt charge allege

different violations of the same statute and are not multiplicious.

The defense's reliance on *Sanabria v. United States*, 437 U.S. 54, 69 n. 24, 98 S.Ct. 2170, 2182 n. 24, 57 L.Ed.2d 43 (1978), is misplaced. *Sanabria* addresses a single violation of a single statute. This court's review of the indictment in this case shows that counts 1 and 2 charge different violations, one for a pattern of racketeering and one for collection of unlawful debt. *Cf. United States v. Dean*, 647 F.2d at 788 (Determination in a given case of the number of patterns or agreements requires examination of the four corners of the charges.). Defendants' motion is denied.

C. Defendants' Joint Motion to Strike Surplusage from the Indictment

Defendants move to strike as surplusage portions of the indictment including the preamble (5 pages preceding count 1), the use of the words "racketeering" and "loansharking," and the use of aliases. In addition, at oral argument defendants moved to strike phrases such as "and with others" and "and other criminal means."

> A motion to strike surplusage from an indictment is addressed to the sound discretion of the District Court and should be granted only where it is clear that the allegations contained therein are not relevant to the charge made or contain inflammatory and prejudicial matter.

Dranow v. United States, 307 F.2d 545, 558 (8th Cir.1962); *see also United States v. DeFabritus*, 605 F.Supp. 1538, 1546 (S.D.N.Y.1985). The court will apply the above articulated standard to language challenged by defendants.

(1) The Preamble

The indictment contains a five-page preamble including a descriptive paragraph on each of the twenty-one defendants. They appear to be arranged in an order of importance in terms of criminal culpability – defendant Gaetano Vastola, the alleged "boss," is first, followed by the nine other RICO defendants, who are in turn followed by the eleven non-RICO defendants.

The government characterized the preamble as a "roadmap" at oral argument and asserted that it "modifies" the 114 counts of the indictment. The court is not opposed to the idea of the use of a roadmap-type preamble in a complex multi-defendant case. However, the particular preamble in question raises several serious concerns.

First of all, it contains additional narrative which is not contained in the counts of the indictment. The preamble is not simply a roadmap indicating which defendants are indicted for which crimes. It contains information which may be meaningful to a jury's consideration of the guilt of the defendants. For example, the paragraph describing defendant Vastola states that he was the "boss of the Vastola Organization," that he "represented his Organization in its dealings with other criminal groups," and that he was in a "position of ultimate authority." The paragraph describing defendant Brocco, a RICO defendant, states that he was a "cousin and close associate of Vastola," that he "frequently directed the illegal conduct of other members," and that he participated in "most of the criminal activities of the organization." The paragraph describing defendant Uris, a non-

RICO defendant, states that he was "actively involved in the operation of the Vastola Organization's illegal bookmaking facility on Staten Island." The court is concerned that the jury's deliberations will be unduly influenced by the preamble (the jurors have a copy of the indictment while deliberating), yet the jury will not explicitly be required to evaluate the probativeness of this information. Since the information is not specifically confined within any particular count or counts, the court is concerned that the jury could refer to it and consider it in evaluating counts to which it does not apply. For example, defendant Vastola's "dealings with other criminal groups" as described in the preamble may be considered by the jury in evaluating each and every charge against him, when only some of those charges involve such dealings. The preamble lacks any instructive device to link the narrative information contained in it with the particular charges it is meant to modify. The danger is particularly acute for the non-RICO defendants who are included in the same preamble listing as the RICO defendants. Each non-RICO defendant is described as carrying out a criminal activity of the "Vastola Organization" or the "Vastola enterprise." The references in the narrative to the organization or enterprise are relevant to the RICO allegations and thus not necessarily unduly prejudicial to the RICO defendants. The content of the narrative on the non-RICO defendants along with the location in the same preamble listing as the RICO defendants may lead the jury to infer that the non-RICO defendants are accused of RICO crimes. Anything in the indictment that allows the jury to infer involvement with uncharged crimes (whether the inference is based on the location of narrative

descriptions or the content of such descriptions) is improper. *DeFabritus*, 605 F.Supp. at 1547; *United States v. Hubbard*, 474 F.Supp. 64, 82-83 (D.D.C.1979); *United States v. Brighton Bldg. and Maintenance Co.*, 435 F.Supp. 222, 230 (N.D.Ill.1977), *aff'd* 598 F.2d 1101 (7th Cir.), *cert. denied*, 444 U.S. 840, 100 S.Ct. 80, 62 L.Ed.2d 52 (1979).

In addition to the court's concern that narrative information in the preamble will be used to modify charges to which it does not apply, the preamble contains irrelevant and vague language which may imply guilt by association or insinuate unalleged facts. For example, defendant Brocco is described as a "cousin" of Vastola who "frequently directed illegal conduct" and who participated in "*most* of the criminal activities." (emphasis added). Although the government's evidence may turn out to prove these allegations, they are not specifically relevant to all the crimes alleged and allow improper inferences.

> [T]he words "various," "including but not limited to the following," "among other things," "and related matters," "on a number of occasions," "at least," "other illegal and improper activities," "and elsewhere," and "besides the defendants" shall be stricken from the indictment as irrelevant and prejudicial.

Hubbard, 474 F.Supp. at 82.

In addition to this court's apprehension of the prejudicial effect of the preamble on jury deliberations, the court is concerned with the prejudicial effect on the jury of listening to the *judge* recite this preamble at the opening of the case. The court in no way is ruling that the

government is prohibited from properly introducing these allegations in opening to the jury.

The court has considered various alternative means to remedy its above described objections to the preamble. The prejudice to the non-RICO defendants is the most serious objection and the most difficult to remedy. If the court were to strike the narrative as to the non-RICO defendants and the objectionable language (described later in subparts 2-4) as to the RICO defendants, the resulting preamble would be so tortured that it would be of little use. Therefore, the court will strike the entire preamble.

As alluded to earlier, this court is not opposed to the use of a preamble per se. However, its function should be to serve as a guide to what is alleged in the counts that the jury will actually evaluate. It should not contain additional information to what is alleged in the counts, nor should it contain terminology that carries with it connotations of culpable behavior. The court notes *in dicta* that the problem of the inference of uncharged crimes bearing on the non-RICO defendants could be cured either by striking references to the RICO enterprise in the narrative following each non-RICO defendant's name, or by confining such references to the count charging the RICO enterprise.

(2) "Racketeering" and "Loansharking"

The challenge to the use of the word "racketeering" is without merit. It is a statutory term and used throughout the indictment in a reasonable manner. *United States*

v. Ianniello, 621 F.Supp. 1455, 1479 (S.D.N.Y.1985), *aff'd*, 808 F.2d 184 (2d Cir.1986); *United States v. Persico*, 621 F.Supp. 842, 860 (S.D.N.Y.1985).

The defendants also challenge the use of the word "loansharking," which is not a statutory term. The term is used on numerous occasions; in count 1 for example, "loansharking and extortion" and "loanshark victims." *See* counts 1, 1(b), and 2(c). In addition, the chart in count 1 entitled "Pattern of Racketeering Activity – Racketeering Acts" includes a category of "Loansharking and extortion" acts which correspond to counts 30, 31, 35, 36-39, 40, 95, and 97. The court is concerned that the term "loansharking" as used is redundant and will have an inflammatory effect on the jury. The word "loansharking" is defined as "the practice of lending money at exorbitant rates of interest," *Websters' New Collegiate Dictionary* 674 (1975), yet the court is concerned that the word has connotations of threatening behavior. To the extent that the word is used to suggest threatening behavior, it is redundant because "extortion," a statutory term, already accompanies it. ("Extort" is defined as "to obtain from a person by force or undue or illegal power of ingenuity." *Id.* at 406). To the extent that the term "loansharking" is used to described "criminally usurious loans" the term is prejudicial because these activities are not necessarily violent or threatening. *See United States v. Hubbard*, 474 F.Supp. at 83 ("The Court finds that the use of such colorful words [e.g. infiltrate, burglary . . .] to describe the allegations in the indictment is improper where less colorful and more accurate words would suffice."). The court is aware that other courts have found such colorful terms appropriate where the government will attempt to

prove their relevance to the counts charged, *United States v. Gambale*, 610 F.Supp. 1515, 1544 (D.Mass.1985), but the court finds for the above-stated reasons that in the context of this indictment the term "loansharking" serves no useful purpose. Therefore, the government may elect between striking the terms "loansharking" and "loanshark" or replacing them with a form of the more objective terms noted above.

The defendants have moved to strike the use of aliases in the indictment. The government has argued that the pleading and proof of aliases is necessary to identify the defendants' illegal actions. *United States v. Persico*, 621 F.Supp. at 861. Although this point was not specifically addressed at oral argument, the court assumes from the government's representations that it plans to introduce at trial such proof as to each alias used in the indictment. The court will request such a representation on the record from the government when the government next makes a pre-trial appearance before the court. The defendants' motion is denied without prejudice to their right to renew the motion if the government fails to make such a representation, or if the government fails to introduce such proof in the presentation of its case at trial. *Id.* at 861.

(4) "[A]nd with others" and "and others" and "and other criminal means"

At oral argument, defendants moved to strike the terms "and with others" and "and others" and "and other criminal means." *See e.g.* counts 30, 37. These types of terms "may encourage the jury to draw inferences that

the defendants are believed to be involved in (illegal) activities not charged in the indictment". *Hubbard*, 474 F.Supp. at 82; *see also* DeFabritus, 605 F.Supp. at 1547; *Brighton*, 435 F.Supp. at 230-31 (striking "among others") (the government may not use the indictment to "persuade the jury that the crime alleged has great and hidden implications") (footnote omitted). The terms "and with others" and "and others" and "and other criminal means" are to be struck from the indictment. In conclusion, the court notes that by striking the language described above, it does not foreclose the government from presenting any proof relevant to the charges at trial. *See e.g. DeFabritus*, 605 F.Supp. at 1547. These alterations do not broaden or materially alter the charging terms of the indictment. *United States v. Atisha*, 804 F.2d 920, 927 (6th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 955, 93 L.Ed.2d 1003 (1987); *United States v. Dawson*, 516 F.2d 796, 804 (9th Cir.), *cert. denied*, 423 U.S. 855, 96 S.Ct. 104, 46 L.Ed.2d 80 (1975). Defendants' motion to strike surplusage is granted in part and denied in part.

D. Defendant Farone's Motion to Dismiss Counts 1 and 3

Defendant Farone argues that RICO counts 1 and 3 against him must be dismissed for failure to plead a pattern of racketeering. A "pattern of racketeering activity" requires at least two acts of racketeering activity. 18 U.S.C. § 1961(5). Farone is indicted under five counts other than the RICO counts (28, 30, 31, 33, 34). Count 28 alleges extortion related to a 1.25 million dollar purchase of "cut-out" records from MCA Records, Inc. ("MCA

transaction"), in violation of 18 U.S.C. § 894. Counts 30 and 31 allege the making of extortionate extensions of credit and the collection of such credit pertaining to seven individuals, including a $50,000 credit to John LaMonte. Counts 33 and 34 allege interference with commerce by threats or violence by means of extortion in the MCA transaction and usurious interest payments on the $50,000 LaMonte loan. The "Pattern of Racketeering-Racketeering Acts" chart in the indictment lists multiple counts with each act. The acts relevant to Farone are associated with the counts indicated as follows: Act 17-counts 28, 33, 34; Act 18-counts 30, 31. The test for determining whether two acts constitute a pattern has been succinctly articulated as follows:

> RICO "pattern" requires separate criminal transactions or events, but all these acts can comprise one fraudulent scheme and still form a "pattern" provided that the transactions share common perpetrators, victims or motives, extend over a substantial period of time, and that the transactions do not simply involve ministerial acts.

United States v. Freshie Co., 639 F.Supp. 442, 445 (E.D.Pa.1986), (*citing Graham v. Slaughter*, 624 F.Supp. 222, 224-25 (N.D. Ill.1985)). The *Freshie* court found that *Sedima* did not require two different criminal episodes. *Id.* (discussing *Sedima S.P. R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985)) (The *Sedima* discussion of the RICO legislative history points out that a mere showing of two acts is not sufficient. Instead, the Court requires a showing of "continuity plus relationship." "[C]riminal conduct forms a pattern if it embraces criminal acts that have the same or

similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." 18 U.S.C. § 3575(e)."). In applying *Sedima*, the second circuit has stated that "when a person commits at least two acts that have the common purpose of furthering a continuing criminal enterprise . . . ," the *Sedima* requirement is met. *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir.1986). These two transactions allegedly share common perpetrators, victims, and motive, and extend over a significant period of time. Therefore, they are plead properly under the two act pattern test articulated in *Freshie* and *Ianniello*.

Farone challenges the pattern of racketeering allegations against him on the grounds that he is only charged with a single act of extortion against John LaMonte. The court's review of the indictment shows this not to be the case. Count 28 is for extortion related to the 1.25 million dollar MCA transaction and Counts 30 and 31 pertain to a $50,000 extortionate extension and collection of credit from LaMonte.

In addition, counts 30 and 31 list six other extortion victims. A finding of guilt as to any one of these victims amounts to an act. The indictment includes all seven victims in the same RICO act and the same count, but a special verdict sheet accompanied by a jury instruction can elicit factual findings on each victim for each defendant named in the count. *United States v. Louie*, 625 F.Supp. 1327, 1339 (S.D.N.Y.1985), *appeal dismissed*, 787 F.2d 65 (2d Cir.1986). Defendants' challenge does raise the *possibility* that Farone could be convicted of two counts among 30 or 31, and 33, for the sole act of extorting or

conspiring to extort John LaMonte on an interest payment on the $50,000 loan. This assumes Farone would be acquitted on the MCA transaction allegation in counts 28, 33, and 34, and allegations under 30 and 31 pertaining to all alleged extortion victims except LaMonte. This possibility raises the question whether such convictions could support a pattern of racketeering count. Sufficient proof of an extortionate interest payment on the $50,000 loan to LaMonte could support a conviction on count 30 or 31, (extortionate extension of credit and collection) and count 33 (extortionate interference with commerce) because the "unit of prosecution" under each statute is different. *See United States v. Provenzano*, 334 F.2d 678, 684 (3d Cir.), *cert. denied*, 379 U.S. 947, 85 S.Ct. 440, 13 L.Ed.2d 544 (1964). However, it would not support a conviction of a RICO pattern. This would violate the *Sedima* continuity requirement designed to prevent "one transaction sliced into a series of facts." *Freshie*, 639 F.Supp. at 444. Such proof would not demonstrate acts which are "sufficiently differentiated," to make up a RICO pattern. *Id.* at 445. (*quoting Kredietbank, N.V. v. Joyce Morris, Inc.*, No. 84-1903, slip op. at 5 (D.N.J. January 9, 1986) [Available on WESTLAW, DCT database]). Therefore, a special verdict sheet will be necessary for counts 28, 29, 30, 31, and 34. Appropriate jury instructions will insure that, in the event of a RICO conviction, such conviction is supported by a unanimous jury finding of guilt on two separate acts. Counts 33 and 34 will require a special verdict sheet indicating whether a conviction is based either on the MCA transaction or the interest payment on the $50,000 loan. *Cf. United States v. Dansker*, 537 F.2d 40, 51 (3d Cir.1976), *cert. denied*, 429 U.S. 1038, 97 S.Ct. 732, 50 L.Ed.2d 748 (1977) (Where

defendants were indicted in a conspiracy count which was submitted to the jury on alternative theories (bribing of two different officials), and the court ruled that the government failed to prove bribery on one of the theories, a *general* verdict of guilty on the conspiracy count was vacated: "In the instant case, the possibility thus remains, albeit slim, that the jury found that the defendants engaged in a conspiracy to bribe Serota alone. . . . ") (emphasis added). The indictment properly pleads a pattern of racketeering against Farone. Defendant Farone's motion is denied.

E. Defendants' (Levy and Fisher) Motion to Dismiss Counts 33 or 34 as Duplicitous or in the Alternative to Force the Government to Elect Between Charges Alleged

Counts 33 and 34 charge the same nine defendants with interference with commerce by threats or violence, 18 U.S.C. § 1951. Count 33 is a conspiracy count. Each count alleges that the means of such interference were related to the MCA transaction extortion and collection of usurious interest payments on separate loans. Defendants challenge each count on the basis of duplicity.

Duplicity is the joining in a single count of two or more distinct separate offenses. *United States v. Starks*, 515 F.2d 112, 116 (3d Cir.1975). The "unit of prosecution" under the Hobbs Act, 18 U.S.C. § 1951, is "interference with commerce." *Provenzano*, 334 F.2d at 685. The jury can base its determination on any one of the enumerated acts that the statute allows, (i.e. robbery, extortion, conspiracy) and that the indictment alleges. The fact that the government has conceded that Levy and Fisher "are not

to be alleged to be involved in the collection of the $50,000 loan," MOL of United States in Opposition at 43 n.*, is not grounds to dismiss either count. The counts contain other adequate allegations against Levy and Fisher.

At oral argument, defendant Canterino joined the motion and argued that a conviction under either count could not stand as to any defendant for which there is inadequate proof indicating involvement with the collection of the interest payments on the $50,000 loan. Canterino asserts that the government will not be able to prove that he was associated with the $50,000 loan. However, the government has only asserted that Levy and Fisher are not associated with the loan. MOL of United States. Canterino relies on the proposition of law that a conviction on a conspiracy count submitted to the jury on alternate theories cannot stand when there is inadequate proof on one of those theories. *See United States v. Tarnopol*, 561 F.2d 466, 474-75 (3d Cir.1977); *Dansker*, 537 F.2d at 51.

The alternate theories in the case at bar, as discussed by counsel at oral argument and apparent from the indictment, are (1) a theory based on the 1.25 million dollar MCA transaction, and (2) one based on the $50,000 loan to LaMonte. A special verdict sheet and jury instruction can ensure that the $50,000 loan not be considered against Levy and Fisher (and others if necessary). This will prevent the possibility of problems associated with duplicity. *United States v. Alsobrook*, 620 F.2d 139, 142 (6th Cir.), *cert. denied*, 449 U.S. 843, 101 S.Ct. 124, 66 L.Ed.2d 51 (1980); *Starks*, 515 F.2d at 116 (such problems include double

jeopardy, prejudice at sentencing and on appeal, conviction on less than a unanimous determination, and prejudice of evidentiary rulings). Therefore, defendants' motion is denied.

It became evident at oral argument that counsel for Levy, Fisher, and Canterino, are particularly concerned about the prejudicial effect of being associated with the alleged beating of John LaMonte on May 18, 1985. That alleged beating is the subject of count 32, which names only Vastola, Brocco, and Saka. Various defendants argue that the evidence will show this to be the only violent act carried out by defendants. Therefore, they wish to distance themselves from allegations of violent acts. Counts 33 and 34 link the $50,000 loan to LaMonte with the 1.25 million dollar extortionate MCA transaction involving LaMonte, as an alternate factual basis for an 18 U.S.C. § 1951 conviction. However, the court notes that the nine defendants named in counts 33 and 34 are also named in a number of other counts involving extortion. In any event, the court will not speculate on the probativeness of this evidence, nor the prejudicial effect of the evidence, at this time. The court is obligated to test the indictment against the defense challenges on the basis of those allegations contained on the face of the document. *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590 (1974); *United States v. Boffa*, 513 F.Supp. at 471, 474. In doing so, the court finds that counts 33 and 34 are properly pled.

F. Defendant Harris' Motion to Dismiss Counts 41, 48, and 75 as Insufficient Pleadings and For a Bill of Particulars

Defendants Harris is indicted in three counts: count 41, conspiracy to commit wire fraud pertaining to a

"bust-out scheme"; count 48, conspiracy to commit fraud pertaining to use of Western Union authorization code; and count 75 substantive fraud pertaining to use of an authorization code. Defendant moves for dismissal, arguing that the indictment fails to provide adequate notice to enable him to prepare a defense.

Allegations in a conspiracy count need not be stated with the specificity required of a substantive count. *See e.g., United States v. Clark*, 649 F.2d 534, 539 (7th Cir.1981). The court is sufficient if it pleads the statutory language and contains an adequate statement of an overt act to carry out the conspiracy. *United States v. Sterkel*, 430 F.2d 1262, 1263 (10th Cir. 1970). Only one member, not each member, of the conspiracy need commit an overt act. *United States v. Flaherty*, 668 F.2d 566, 580 n.4 (1st Cir.1981). Counts 41 and 48 adequately describe a conspiracy in violation of 18 U.S.C. § 1343 and include the required listing of an overt act. They also include a full statement of all the elements necessary to constitute the offense. *Russell v. United States*, 369 U.S. 749, 765, 82 S.Ct. 1038, 1047, 8 L.Ed.2d 240 (1962). Wire fraud, 18 U.S.C. § 1343, requires the existence of a scheme to defraud by means of false pretenses and the use of interstate wire communications in furtherance of the scheme. *United States v. Brien*, 617 F.2d 299, 307 (1st Cir.) *cert. denied*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 273 (1980). Conspiracy, 18 U.S.C. § 371, requires the showing of an agreement to commit a crime. *United States v. Borelli*, 336 F.2d 376, 384 (2d Cir.1964), *cert. denied*, 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed.2d 555 (1965). Count 41, ¶4, articulates Harris' specific role in the "bust-out" scheme, to attend trade shows and place orders intending not to pay for the orders. The

count, at ¶1, also alleges an agreement among five conspirators and describes a scheme to defraud. Count 48 alleges a scheme to defraud Western Union Telephone subscribers, a time frame in which the scheme was enacted, and a list of conspirators. In order to prove a violation by Harris in counts 41 and 48, the government must show Harris was a knowing participant in the conspiracy. *United States v. Abrams*, 539 F.Supp. 378, 383 (S.D.N.Y.1982). Count 75 specifically identifies Harris' alleged substantive Western Union crime. As a matter of pleading, the indictment is adequate on all three counts. *Roberts v. United States*, 226 F.2d 464, 466 (6th Cir.1955); *cert. denied*, 350 U.S. 935, 76 S.Ct. 307, 100 L.Ed. 817 (1956). However, the court finds in its discretion that the defendant is entitled to a more detailed factual description of his alleged role in the bust-out and Western Union conspiracies in order to avoid prejudicial surprise at trial. *United States v. Burgio*, 279 F.Supp. 843, 846 (S.D.N.Y.1968). Defendant's motion to dismiss is denied. His motion for a bill of particulars as to counts 41 and 48 is granted, as incorporated into the bill of particulars ruling at part IV-F of this opinion.

G. Defendant Majuri's Motion to Dismiss Counts 3 and 98

Majuri is indicted in four counts: count 3, RICO conspiracy; counts 98 and 99, gambling conspiracy and gambling; and count 108, possession of firearms. At oral argument Majuri argued for dismissal of the RICO conspiracy count. Majuri points out that neither of the "substantive" RICO counts, pattern of racketeering and collection of unlawful debt (which are incorporated by

reference into the RICO conspiracy count), so much as mentions Majuri's name.

The conspiracy count is sufficient if it pleads the statutory language and contains an adequate statement of an overt act. *Sterkel*, 430 F.2d at 1263. A RICO conspiracy defendant must only agree to the commission of the predicate acts and need not agree to commit those acts personally. *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.1985). "The element of knowingly and willfully combining, conspiring and agreeing to conduct and participate in the affairs of the enterprise is a sufficient allegation to withstand a motion to dismiss or sever." *United States v. Salerno*, No. 586 Cr. 245, slip op. at 11 (S.D.N.Y. March 10, 1987). In order to prove a violation the government must show Majuri was a knowing participant in the conspiracy. *United States v. Abrams*, 539 F.Supp. at 383. The indictment adequately pleads the conspiracy. The fact the Majuri is not indicted under counts 1 and 2 is not a fatal flaw to his being named in count 3. However, the indictment lacks enough particularized information to allow Majuri to do pretrial investigation in support of a defense to this court. *Burgio*, 279 F.Supp. at 846. The motion to dismiss count 3 is denied. The motion for a bill of particulars as to count 3 is granted, as incorporated into the bill of particulars ruling at part IV-F of this opinion.

Majuri also challenges count 98, arguing that it charges multiple conspiracies instead of a single conspiracy. Count 98 on its face charges only a single conspiracy. The allegation is of a single agreement involving multiple offenses. *United States v. Maker*, 751 F.2d 614, 625 (3d Cir.1984), *cert. denied*, 472 U.S. 1017, 105 S.Ct. 3479, 87

L.Ed.2d 614 (1985); *Boffa*, 513 F.Supp. at 474. The ultimate question of whether there was a single conspiracy, multiple conspiracies, or no conspiracy at all, will be resolved at trial. *United States v. Smith*, 789 F.2d at 200. Majuri's motion to dismiss count 98 is denied.

III. MOTIONS TO SEVER

A. The Severance Plan

The defendants move jointly for severance under Fed.R.Crim.P. 8 and 14, and several defendants file motions to sever individually (Levy and Fisher also rely on Rule 2 as an authority in support of severance). For the reasons stated below, the motions to sever are granted in part and denied in part. Rule 8 is not permissive; the rule requires severance as a matter of law based on the pleadings. *United States v. Somers*, 496 F.2d 723, 729 (3d Cir.), *cert. denied*, 419 U.S. 832, 95 S.Ct. 56, 42 L.Ed.2d 58 (1974). In a multi-defendant case, Rule 8(b) applies. 1 C. Wright, *Federal Practice and Procedure* Criminal 2d § 144 at 494 & n. 1 (*citing United States v. Perry*, 731 F.2d 985, 989 (D.C.Cir.1984)). Rule 8(b) has been read as independent and exclusive of Rule 8(a). Wright, § 144 at 495. Therefore, the "common scheme or plan language" of Rule 8(a), which is broader than the 8(b) language, is not applicable under Rule 8(b).

> When similar but unrelated offenses are jointly charged to a single defendant, some prejudice almost necessarily results, and the same is true when several defendants are jointly charged with a single offense of related offenses. Rule 8(a) permits the first sort of prejudice and Rule 8(b) the second. But the Rules do not permit

> cumulation of prejudice by charging several defendants with similar but unrelated offenses.

Cupo v. United States, 359 F.2d 990, 993 (D.C.Cir.1966), *cert. denied*, 385 U.S. 1013, 87 S.Ct. 723, 17 L.Ed.2d 549 (1967). Separate and unrelated conspiracies, not related as elements of a RICO enterprise, cannot be joined together in the same prosecutions. *See e.g. United State v. Weisman*, 624 F.2d 1118, 1129 (2d Cir.), *cert. denied*, 449 U.S. 871, 101 S.Ct. 209, 66 L.Ed.2d 91 (1980) (if offenses are adequate to be plead as RICO predicate acts, they can be joined under Rule 8(b)).

Rule 14 allows the court in its discretion to serve on the basis of prejudicial joinder of defendants or offenses. A severance is not required merely because one would improve a defendant's chances of acquittal. *United States v. Rucker*, 586 F.2d 899 (2d Cir.1978). A defendant must show that joinder would result in a manifestly unfair trial. *United States v. Reicherter*, 647 F2d 397, 400 (3d Cir.1981).

The defendants have made a joint severance suggestion as follows:

> *Trial #1* Extortion/Loansharking Offenses (Counts 28-40)
>
> *Trial #2* frauds (Credit, Western Union, Insurance, Bankruptcy), and Copyright Infringement (Counts 41 & 97)
>
> *Trial #3* Gambling Offenses (Counts 98-106)

M.O.L. in Support of Defendants' Substantive Motions (this proposal omits counts 1-27 and 107-114). This proposal drew widespread support from various defense

counsel at oral argument. The government opposed any severance.

For the reasons stated below, the court will sever this matter into several separate trials. Trial of the RICO defendants will be severed from non-RICO defendants for purposes of case management. The non-RICO defendants will be tried in a series of separate trials under the requirements of Rule 8(b). The trials will include the following offenses:

Severance Plan

A. *Non-RICO Defendants*

1. Extortion – Counts 28, 33, 34. (Defendants Canterino, Levy, and Fisher)

2. Bust-Out Fraud – Counts 41, 46, 47. (Defendants Howard and Harris)

3. Western Union Telephone Fraud – Counts 48, 75, 80, 81, 82. (Defendants Howard, Harris, Brennan, Marino, and Sanzaro)

4. Insurance Fraud – Count 91. (Defendant Marino)

5. Gambling – Counts 98-106. (Defendants D'Alessio, Sr., D'Allessio, Jr., and Uris)

B. *RICO Defendants*

6. RICO enterprise charges and all charges against 10 defendants named in count 3 (counts 1-45, 48-74, 76-79, 83-106, and 111-114). Counts 107-110 to be tried in the second stage of a bifurcated trial. (Defendants Vastola, Brocco, Massaro, Farone, Martire, Saka, Stone, Santoni, Zito and Majuri)

7. Firearms charges against Majuri – Count 108. (Defendant Majuri)

1. The RICO Trial

Rule 8(b) allows for trial of all defendants "alleged to have participated in the same act or transaction or in the same series of acts or transactions." Wright, § 144 at 495; (citing *United States v. Kenny*, 645 F.2d 1323, 1344 (9th Cir.), *cert. denied*, 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 425 (1981); *United States v. Corral Martinez*, 592 F.2d 263, 268 (5th Cir. 1979)). Offenses linked to a common conspiracy may be joined together. *Smith*, 789 F.2d at 206. The second circuit has specifically held that RICO predicate acts in a pattern of racketeering activity may "constitute part of a 'series of acts or transactions constituting an offense' within the meaning of Rule 8(b)." *Weisman*, 624 F.2d at 1129. Joinder of all the RICO defendants will allow the government to develop the entire RICO conspiracy as charged. *United States v. Provenzano*, 688 F.2d 194, 199 (3d Cir.), *cert. denied*, 459 U.S. 1071, 103 S.Ct. 492, 74 L.Ed.2d 634 (1982). To force the government to try some of the alleged criminal activities separately from others alleged to be part of the same RICO enterprise would prevent the government from prosecuting the type of crimes the statute was intended to combat. *Persico*, 621 F.Supp. at 854; *see also Turkette*, 452 U.S. at 583, 101 S.Ct. at 2528. The defense has also sought severance of various criminal activities on the theory that extortion and narcotics activities as alleged will have prejudicial spillover onto the other "white collar" activities alleged. The court does not accept this argument. All of the criminal activities, except the weapons offenses, are alleged to be affairs of the

enterprise. The court is confident that the jury will be able to compartmentalize the different types of criminal activities. *Dansker*, 537 F.2d at 62; *Persico*, 621 F.Supp. at 853; *see also United States v. Castellano*, 610 F.Supp. 1359, 1412-13 (S.D.N.Y1985) (denial of severance motion of defendants not associated with alleged murder). The indictment properly pleads a RICO enterprise conspiracy, thus all defendants so named and offenses alleged to be affairs of the enterprise may be joined under Rule 8(b). *Somers*, 496 F.2d at 729 ("A Rule 8(b) motion is addressed to the pleadings, and not to the proof subsequently adduced.") As to the alleged prejudicial nature of the extortion and narcotics evidence to be presented to the jury, the court has a continuing obligation under Rule 14 to evaluate the prejudicial effect of such evidence and take any necessary steps. Wright, § 144 at 521, (*citing Schaffer v. United States*, 362 U.S. 511, 514, 80 S.Ct. 945, 947, 4 L.Ed.2d 921 (1960)).

a. Case Management

The severance of the RICO defendants from the non-RICO defendants is necessary for case management reasons. The court notes that a severance of RICO from non-RICO defendants will in no way prejudice the government in its efforts to enforce the RICO statute. *See United States v. Persico*, 621 F.Supp. at 854 (goal of statute is to prosecute organized crime). All criminal activities and defendants alleged to be part of the criminal enterprise will be tried in one joint trial. Other courts have employed severance on manageability grounds in similar multi-defendant cases, although the efficiency outcome of such

plans has yet to be demonstrated. *See* M.O.L. in Opposition at 76-77 (discussing *United States v. Castellano*, transcript at 13, September 9, 1985) (remarks of Judge Duffy) and *United States v. Gallo*, No. 86-452, slip op. (E.D.N.Y. July 8, 1986) (Defendants' Exhibit D) (Government contends Judge Weinstein severed on case management grounds).

The court, in its discretion, could allow for the joinder of the non-RICO defendants with the RICO defendants. *See e.g., United States v. Castellano*, 610 F.Supp. 1359, 1396 (S.D.N.Y.1985). The court, however, recognizes that the present case is complicated both by the number of different types of criminal activities alleged and the number of defendants charged. It is likely that severance will lead to some redundancy in the presentation of evidence. However, there are also efficiencies associated with severance. It will not be necessary for the non-RICO defendants, who are named in a relatively small number of counts, and their counsel to sit through a trial estimated to take 12 months, when the proof that concerns them could be put forward in a matter of days. The possibilities of delay caused by scheduling problems of counsel and extended cross-examination in a 21-defendant trial will be somewhat reduced by the severance. The specter of managing 21 defendants and their counsel also presents difficulties to the court system in terms of providing adequate physical space. The system would be strained to provide a courtroom large enough to hold all these people and to provide rooms for consultation among counsel.

The confinement of RICO charges to one trial will assist each of the several juries in compartmentalizing the

evidence put before it. The court recognizes that the total time spent in court on the several trials, mandated by this severance plan, may equal the 12-month estimate of the 21-defendant trial. However, use of several different juries, each for a shorter duration of time, is an important factor in increasing the efficiencies and the abilities of each jury to reach a fair result. The inevitable delays caused by illness and scheduling problems of jurors will become much more manageable in the context of shorter trials. The likelihood of obtaining a diverse cross section of the population in the selection of a jury is heightened by greater availability of jurors to serve in trials that do not interrupt employment as severely as would the estimate one year interruption in the case at bar. An exceedingly long trial mitigates against the jury's ability to devote its full attention to the trial and to properly evaluate and recollect all the evidence. Of course, in the exceptional case, a lengthy trial cannot be avoided and is in fact the best mechanism to achieve a fair trial for all parties. However, the indictment in the case at bar does not present the exceptional case. Based upon considerable experience in presiding over jury deliberations, this court is confident that the severance plan will better enable each jury to play its central role in achieving the goal of a fair trial.

b. Firearms Charges

i. Title 18 U.S.C. App. § 1202

The court is concerned about the prejudicial effect of a trial that includes firearms charges which require proof of previous felony convictions. Title 18 U.S.C. App. 1202(a)(1) makes possession of firearms by a previously

convicted felon an offense. Counts 107-110 charge various RICO defendants with this offense. The court finds that presenting evidence or even the mere fact of a prior felony conviction to a jury would be prejudicial. The court recognizes the evidence may be "otherwise admissible," and that some courts employ such a test to determine if prior conviction evidence may come in. *See United States v. Sanko*, 787 F.2d 1249, 1251 (8th Cir.1986); *United States v. Begun*, 446 F.2d 32, 33 (9th Cir.1971). However, to avoid the possibility of prejudice resulting from admission of such evidence, the court will conduct a two-stage trial. The first stage of the trial will consist of the presentation of the entire RICO case, jury deliberations, and a verdict, on all the counts except 107-110. The second stage will include the trial of counts 107-110, those counts requiring proof of a prior conviction under 18 U.S.C. App. § 1202(a)(1). this approach, which is suggested as a possible solution to the prior conviction prejudice problem in the government's brief, M.O.L. in Opposition 88, has been employed by the District of Minnesota and cited with approval by the third circuit *in dicta. United States v. Busic*, 587 F.2d 577, 585 (3d Cir.1978), *rev'd on other grounds*, 446 U.S. 398, 100 S.Ct. 1747, 64 L.Ed.2d 381 (1980) (*citing United States v. Franke*, 331 F.Supp. 136 (D.Minn.1971)). This court's bifurcation ruling pertains only to the preclusion of submitting prior conviction evidence for the purpose of proving § 1202 offenses, and in no way serves as a ruling on the question of admitting prior conviction evidence for any other purpose.

ii. Title 26 U.S.C. § 5861

The firearms charges under 26 U.S.C. § 5861 (possession of unregistered and unidentified firearms (counts

111-114) need not be tried separately from the bulk of the charges, since they do not require proof of a prior conviction. Firearms charges are recognized to be related to narcotics activity to the extent necessary to allow joinder of such charges under Rule 8(b). *Sanko*, 787 F.2d at 1251 (proof of firearms possession admissible in a narcotics trial as evidence that motive of possession is related to narcotics activity); *United States v. Milham*, 590 F.2d 717, 721 (8th Cir.1979) (judicial notice of relationship between narcotics dealing and firearms); *Begun*, 446 F.2d at 33 (9th Cir.1971) (firearms evidence would be admissible on narcotics charges).

2. Majuri Firearms Trial

Defendants Vastola, Brocco, and Massaro, are all charged with firearms offenses and narcotics offenses. Majuri is also charged with a firearms offense, count 108. Majuri is not specifically indicted for narcotics or extortion, but is named in two gambling counts and the RICO conspiracy count. The RICO conspiracy count does not specifically identify firearms with the enterprise as charged. The court could, within its discretion, allow joinder of all firearms charges against RICO defendants, because the enterprise is alleged to be involved in narcotics activity. *See, e.g. Sanko*, 787 F.2d at 1251. However, that would be an unfair extension of the *Sanko* line of cases. The firearms charges against Majuri appear on the face of the indictment to be totally unrelated to narcotics activity. Therefore, in order to be sure to avoid prejudice to Majuri, the court, under the authority of Rule 14, will conduct a separate trial on the firearms charges against Majuri. *United States v. Boscia*, 573 F.2d 827, 833 (3d Cir.),

cert. denied, 436 U.S. 911, 98 S.Ct. 2248, 56 L.Ed.2d 411 (1978). In conclusion, with the exception of the Majuri firearms count, all RICO defendants will be tried on all counts charged in a joint bifurcated trial. The first stage will include all counts charged except counts 107-110; counts 107-110 will be tried in the second stage. In addition, Majuri's firearms count will be tried separately.

3. Other Individual RICO Defendants' Motions to Sever

a. Majuri

The court notes that two of the RICO defendants, Majuri and Stone, move for a severance. Majuri argues that unless he is tried in a single trial, he will be deprived of his right to call several co-defendants as witnesses. Four factors are to be considered by the court in evaluating this motion: (1) likelihood of co-defendant's testifying; (2) degree to which such testimony may be exculpatory; (3) degree to which testifying co-defendant would be impeached; and (4) judicial economy. *Boscia*, 573 F.2d at 832. More than the showing of a possibility that a co-defendant will testify is required. *Provenzano*, 688 F.2d at 198. Majuri has alluded to co-defendant affidavits, but none have been provided in support of the motion. The alleged testimony of co-defendants, although contradictory to the government's case, would not be of a highly exculpatory nature, nor would it be beyond impeachment. *See Boscia*, 573 F.2d at 832; *but see United States v. Ditizio*, 530 F.Supp. 175, 177 (E.D.Pa.1982) (statements against penal interest to be made by co-defendants are adequate grounds for severance). Upon considering all of the *Boscia* factors, the court denies Majuri's motion.

The motion is not supported by affidavits and the court finds that it would be highly speculative to sever on the basis of such limited information.

b. Stone

Defendant Stone seeks an indefinite continuance or severance on the basis of severe health risks of trial. The court will reserve opinion on this motion pending a report from counsel following a court-ordered examination of Stone by an independent physician.

4. Non-RICO Defendants' Motions to Sever

Defendant Sanzaro's motion to sever is mooted by the court's severance plan. Count 31 names Sanzaro as an extortion victim. Only RICO conspiracy defendants are named in count 31. Counts 48, 80-82, name Sanzaro as a defendant in Western Union Telephone wire fraud and conspiracy. His defense is in no way antagonistic to the defense of the Count 31 defendants. Even if they had not been severed, Sanzaro could not show what is required in order to obtain severance for mutually antagonistic defenses. *See Provenzano,* 688 F.2d at 193 (such defenses must be irreconcilable and mutually exclusive); *United States v. Crawford,* 581 F.2d 489, 491-92 (5th Cir.1978) (Mutually antagonistic defenses found to exist where the sole defense of each was the guilt of the other.).

The motions to sever by non-RICO defendants for the most part are mooted by the court's severance plan; to the extent any motion is not moot, it is denied.

5. Order of Trials and Continuance Motion

The court suggests that the trials proceed in the order indicated above at part III-A. This order is based on the numerical order of counts in the indictment. The RICO trial is scheduled after the non-RICO trials due to the unavailability of Michael Rosen, Esquire, counsel for defendant Vastola. *See United States v. Gaggi*, No. 555 84 Cr. 63, order (S.D.N.Y. August 13, 1987). All counsel are to appear on September 8, 1987, at 9:30 a.m. to discuss the order of trials in this matter. Counsel should be prepared to make realistic time estimates for each trial. The first non-RICO trial will commence on October 13, 1987, and will be followed by all other non-RICO trials. The RICO trial will commence on March 7, 1988, assuming the availability of Mr. Rosen.

The motion by Mr. Rosen on behalf of defendant Vastola for an extension beyond the above-indicated dates is denied. The court has reviewed the expert report obtained by defense counsel and recognizes that the quantity of tape recordings to be screened is voluminous; however, the court is confident that an organized effort by defense counsel, along with the seven-month continuance of the RICO case, will allow for full and proper preparation of the defense. The original indictment was returned September 19, 1986. RICO defendants had nine months to prepare for pretrial motions, and will have seven months to prepare for trial. The motion for a continuance beyond the dates listed above is denied.

IV. MOTIONS FOR PRETRIAL HEARINGS AND DISCOVERY

A. Defendants' (Levy and Fisher) Motion for Brady Material

Defendants Levy and Fisher are indicted in three counts of the indictment: count 28, 18 U.S.C. § 894 (extortion conspiracy), and counts 33 and 34, 18 U.S.C. § 1951 (interference with commerce by extortion conspiracy). These counts pertain to collection of an extension of credit to John LaMonte d/b/a Out of the Past, Ltd., in connection with the MCA transaction and collection of usurious interest payments on a $50,000 loan to LaMonte. The defendants' *Brady* request seeks "information indicating that Morris Levy and Howard Fisher were extorted and controlled by certain named and unnamed members of the Genovese crime LCN family." Notice of Motion to compel Discovery, Exhibit D (Letter dated February 10, 1987). Defendants allege such material to include: (a) writings, recordings, and photographs, (b) names, addresses, and telephone numbers of people with knowledge of the extortion; and of (c) confidential informants (CI-1 through CI-13) already named in affidavits in support of wiretap applications; (d) agents' notes; (e) relevant audio and video tapes; and (f) relevant notes, memos and reports. The factual basis of the request is derived from material already disclosed to the defense which includes affidavits in support of wiretaps in several districts: Southern district of New York, Northern District of New York, Eastern District of New York, and District of New Jersey. *See* Defendants' Exhibits H-L.

These affidavits contain information indicating that confidential informants had information regarding the relationship between Levy and La Cosa-Nostra ("LCN"), and the relationship between John LaMonte and the government. It appears that these wiretaps were conducted pursuant to a government investigation of the Genovese family. The affidavits show confidential informants had knowledge of Levy's activities and believed that he was under the control of a Vincent Gigante of the Genovese family, that his life had been threatened, and that he had tried to sever his relationship with the Genovese family. The affidavits also show that the informants believed that Levy's brother had been killed some 20 years ago in a mistaken attempt on Levy's life. The affidavits also indicate that Levy had dealings both with John LaMonte and the Genovese family over an extended period of time, including 1984 and 1985. The affidavits providing this information refer to five confidential informants: CI-2, 3, 7, 8, and 9. Affidavit of Leon Borstein, ¶¶ 30-40, filed April 24, 1987; *see also* Defendants' Exhibit H, ¶ 64. The government does not question the genuineness of these threats to Levy. It is the affidavits of government agents which articulate the threats. Defendants seek the requested information (a) to establish defenses including duress, entrapment, and due process outrageous conduct, (b) to support a dismissal motion based on grand jury misconduct, and (c) to support a severance motion based on incompatible defenses. The government opposes the *Brady* motion.

Brady "is not a discovery rule but a rule of fairness and minimum prosecutorial obligation." *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir.1984) (citation omitted).

It requires the disclosure of exculpatory evidence. "Exculpatory evidence includes material that goes to the heart of the defendant's guilt or innocence as well as that which might well alter the jury's judgment of credibility of a crucial question of a witness." *Id.* at 260. The government has a continuing duty to identify exculpatory material and provide it to the defense. *Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). The government's determination as to the existence of *Brady* material is subject to review under a constitutional error standard. *United States v. Agurs*, 427 U.S. 97, 111-14, 96 S.Ct. 2392, 2401-403, 49 L.Ed.2d 342 (1976).

The Assistant United States Attorney ("AUSA") has represented to the court that he has not personally reviewed the investigations associated with the affidavits containing information on Levy, nor has he had detailed discussions with other government agents or attorneys who are intimately familiar with those investigations. Therefore, this court will employ its "Elizabeth Wiretaps" approach, used on a prior occasion in this case, and order the AUSA to review the government investigations concerning Levy for *Brady* information and to report its findings to the court within 15 days of the date of the attached order. *See United States v. Vastola*, No. 86-301, letter opinions (D.N.J. May 21, 1987; June 25, 1987).

The court adds the following guidance to the AUSA in its investigation and development of a report to the court. The defendants have not made an adequate showing to justify the release of the identity of confidential informants. *United States v. Jiles*, 658 F.2d 194, 197 (3d Cir.1981), *cert. denied*, 455 U.S. 923, 102 S.Ct. 1282, 71 L.Ed.2d 465 (1982). For the purposes of this motion, the

court finds that the defendants have not shown that the informant's identities are essential to a fair determination of a cause. *Roviaro v. United States*, 353 U.S. 53, 60, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957). The ultimate determination of the viability of the defendants' duress and entrapment defense will be made at trial. *See United States v. Ciambrone*, 601 F.2d 616, 626 (2d Cir.1979); *United States v. Glaeser*, 550 F.2d 483, 487 (9th Cir.1977). In the meantime, this court will not disturb the government's confidential informant privilege, *Roviaro*, 353 U.S. at 59, 77 S.Ct. at 627, on the basis of highly speculative assertions that the confidential informants possess exculpatory material not already in the record. *Jiles*, 658 F.2d at 198-99. In the event that the government calls a confidential informant as a witness, information pertinent to veracity must be made available at or shortly before appearance at trial. *United States v. Higgs*, 713 F.2d 39, 44 (3d Cir.1983), *cert. denied*, 464 U.S. 1048, 104 S.Ct. 725, 79 L.Ed.2d 185 (1984); *see also United States v. Dansker*, 565 F.2d 1262, 1264 (3d Cir.1977), *cert. dismissed*, 434 U.S. 1052, 98 S.Ct. 905, 54 L.Ed.2d 805 (1978) (where the credibility of a key witness was placed in question by written affidavits, an evidentiary hearing should be conducted to determine if *Brady* material was being withheld).

The court also notes that defendants have called to the court's attention certain occurrences in the case of *United States v. Canterine*, No. 87-57 (S.D.N.Y.), which defendants assert have an impact on this case. Supplemental Affidavit In Support of Motion to Compel at 4-5 and Exhibit R (July 10, 1987). Defendants allege that agents in the *Canterine* case who withheld *Brady* information from the defense are also involved in the *Vastola*

investigation. The AUSA is ordered to investigate this allegation and file a separate *ex parte* report with the court, identifying these agents and describing the roles, if any, of these agents in the *Vastola* investigation. Such report should be filed within 15 days of the attached order.

In conclusion, defendants' motion to compel is denied, and the government is ordered to review the above described material and file the requested reports.

B. Defendants' Joint Motion for Pretrial Proffer Of A Single Conspiracy

Defendants seek an order requiring the government to make a pretrial proffer that one RICO conspiracy (and not multiple RICO conspiracies) is charged in the indictment. The government opposes this request, relying on the proposition that the good faith allegation of a single conspiracy in the indictment allows the government the opportunity to proceed to trial on that charge. *Somers*, 496 F.2d at 729-30; *see also Maker*, 751 F.2d at 626; *United States v. Gallagher, II*, 602 F.2d 1139, 1142 (3d Cir.1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 729, 62 L.Ed.2d 728 (1980) (citation omitted) ("[T]he sufficiency of an indictment 'may not be properly challenged by a pretrial motion on the ground that it is not supported by adequate evidence.' "). District courts have specifically applied this principle to RICO conspiracy indictments. *Persico*, 621 F.Supp. at 857; *Boffa*, 513 F.Supp. at 473. However, as the defense points out, some courts have undertaken pretrial scrutiny of the indictment either to assist the court in controlling the case or to prevent the prejudicial effect of

misjoinder of a RICO conspiracy count. *See Castellano*, 610 F.Supp. at 1397 ("[L]imited [pretrial] review enables a court to protect persons from the enormous burdens and risks of a major trial, without significantly or improperly limiting the government's right to prosecute."); *United States v. Gallo*, No. 86-452 (Tr. 27) ("I can't rule on these things without, . . . getting an analysis of what your theory is, what you plan to prove and what you're going to use to prove it."). *But see United States v. Donsky*, 825 F.2d 746, 751-52 (3d Cir.1987) (footnote omitted) ("We do not, however, believe that the district court's decision in this case, which required proof delineating what the government intended to prove at trial as to each of the various defendants, was proper."). The court is sensitive to the concerns that fueled the pretrial scrutiny of the indictment in the above noted cases. However, the court finds that a pretrial proffer or hearing would be premature. In the event that the government's case is insufficient as to the proper allegations and proof of a single RICO conspiracy or involvement of a particular defendant, the court will entertain appropriate motions at the conclusion of the government's case. Defendants' motion is denied.

C. Defendants' Joint Motion for a James Hearing

Defendants also seek a *James* hearing in order to ascertain if statements of co-conspirators (Fed.R.Evid. 801(d)(2)(E) are admissible.

> A co-conspirator statement may be admitted under Fed.R.Evid. 801(d)(2)(E) if it meets three

> conditions: (1) there must be independent evidence establishing the existence of the conspiracy and connecting the declarant and defendant to it; (2) the statement must have been made in furtherance of the conspiracy; and (3) it must have been made in the course of the conspiracy.

United States v. Ammar, 714 F.2d 238, 245 (3d Cir.), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed.2d 311 (1983) (citation omitted).

A pretrial hearing to establish such a foundation for a co-conspirator statement is a matter within the trial court's discretion. *Id.* at 246. The third circuit, under certain circumstances, has allowed such statements to be admitted subject to the government making the required showing before the close of its case. *United States v. Continental Group, Inc.*, 603 F.2d 444, 456-57 (3d Cir.1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980). The *Continental* court found that such a procedure should be used sparingly due to the danger of prejudice, but that its application was particularly appropriate in multi-defendant conspiracy cases. *Id.* This court will follow the procedures outlined in *Continental*. To the extent feasible, the government will be required to make the *Ammar* showing prior to submission of such statements. However, in limited circumstances, the court will allow for the admission of co-conspirator statements pending a final threshold determination of conspiracy by the court before sending the case to the jury. *See e.g. Ammar*, 714 F.2d at 247. Defendants' motion is denied.

D. Defendants' Joint Motion for Pretrial Hearings on Evidentiary Material (Prior Conduct, Prior Convictions, Bad Acts)

Defendants seek an order requiring that the government disclose the evidentiary material it will use at trial

under Fed.R.Evid. 403, 404(b), 608, 609(e). The question presented by the motion calls for the balancing of the prejudicial effect of the evidence against the probative value of the evidence of prior conduct, prior convictions, or bad acts. *Luce v. United States,* 469 U.S. 38, 41, 105 S.Ct. 460, 463, 83 L.Ed.2d 443 (1984). Such balancing is most effectively done at trial when such evidence can be evaluated in the factual context of the government's case and the defense put forward. *Id.* at 41, 105 S.Ct. at 463. This court will deal with these issues outside of the presence of the jury as they arise. It would be unduly speculative to try to resolve them without developing the factual context of the case. *See generally United States v. Bianco,* 419 F.Supp. 507, 508 (E.D.Pa.1976), *aff'd mem.* 547 F.2d 1164 (3d Cir.1977). The joint motion of the defendants and all individual motions for pretrial evidentiary hearings are denied.

E. Defendants' Joint Motion for Pretrial Discovery (Witness List, Statements of Non-Testifying Witnesses, Grand Jury Information)

Defendants have made a broad motion for various types of information to be disclosed by the government. Some of these requests have been treated above, (i.e. prior conduct, prior convictions, bad acts). Specifically, the defendants seek production of a witness list, statements of non-testifying witnesses, and grand jury information. The government is obligated to disclose information under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); and the Jencks Act, 18 U.S.C. § 3500. No evidence has been

brought before the court that the government is not meeting or will not meet these continuing obligations. With regard to the specific requests for a witness list and statements of non-testifying witnesses; neither is required to be disclosed as *Brady* material. *See United States v. DiPasquale*, 740 F.2d 1282, 1294 (3d Cir.1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1226, 84 L.Ed.2d 364 (1985) (witness list); *United States v. Fischbach and Moore, Inc.*, 576 F.Supp. 1384, 1390 (W.D.Pa.1983) (recorded statements of alleged co-conspirators); *United States v. Kenny*, 462 F.2d 1205, 1212 (3d Cir.), *cert. denied*, 409 U.S. 914, 93 S.Ct. 233, 34 L.Ed.2d 176 (1972) (witness statements discoverable under Jencks Act). The defense seeks disclosure of the identity of confidential informants. No specific need for disclosure has been demonstrated. *United States v. Jiles*, 658 F.2d 194, 197 (3d Cir.1981), *cert. denied*, 455 U.S. 923, 102 S.Ct. 1282, 71 L.Ed.2d 465 (1982). At oral argument, the defense suggested that information pertinent to John LaMonte should be disclosed now because "this is an impeachment case." The court will require that such information be released pursuant to the normal procedure of the Jencks Act in this district. This requires release in time for effective cross-examination. The government is encouraged to release such information on or before the first day of trial.

The joint defense motion and defendant Vastola individually seek disclosure of grand jury materials, or in the alternative, an *in camera* review of the grand jury minutes. There exists a long established policy of secrecy of grant jury proceedings. *See Pittsburgh Plate Glass Co. v. U.S.*, 360 U.S. 395, 399, 79 S.Ct. 1237, 1240, 3 L.Ed.2d 1323 (1959). However, the trial court can invade the secrecy of the

proceedings in the interests of justice where a defendant demonstrates "a particularized need." *Id.* at 400, 79 S.Ct. at 1241. The defense request for disclosure of unauthorized persons, impanelment date, and other procedural details, is not supported by such a demonstration. A "presumption of regularity" attaches to the proceedings, and the defense has provided nothing to the court, such as reliance on perjured testimony, to disturb the secrecy. *United States v. Vaughn,* 510 F.Supp. 206, 209 (D.N.J.1981). Defendant Vastola's argument that there could be no evidence presented to the grand jury to support his indictment on narcotics charges is also without merit. This court does not know the full scope of the evidence presented to the grand jury, nor need it inquire into such evidence at this time. *United States v. Louie,* 625 F.Supp. 1327, 1342 (S.D.N.Y.1985), *appeal dismissed,* 787 F.2d 65 (2d Cir.1986) (argument that facts do not support the charges is premature). If inadequate evidence of narcotics activity exists, the narcotics counts can be challenged by a motion to dismiss. The motions to disclose to conduct *in camera* review of the grand jury materials are denied.

F. Defendants' Joint Motion For A Bill Of Particulars

The joint defense motion seeks a 110-item bill of particulars. The purpose of a bill of particulars is "to inform the defendant of the nature of the charges against him, to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately described offense." *United States v. Addonizio,* 451 F.2d 49, 54 (3d Cir.1971), *cert.*

denied, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812 (1972). A motion for a bill of particulars is a discretionary matter for the trial court. *Id.* Defendants' request was denied in its entirety by the government.

The defense has categorized its request into four groups: (1) information about when, where and by whom the alleged criminal acts or managerial acts relevant to the alleged enterprise were committed; (2) information about the identity of non-named participants in these acts; (3) information about uncharged overt acts or other uncharged criminal conduct which the government will seek to prove at trial; and (4) information necessary to determine whether the indictment is proper. Some of what is being sought in category (3) has already been asked for and denied in the context of other motions (e.g., prior conduct, prior convictions, bad acts). In addition, the request for information necessary to determine the adequacy of the indictment, category (4), has been denied for the most part based on other rulings made in this opinion. The court has found in large part that the indictment is adequate. Pleading of the statutory language that provides basic notice of the culpable behavior is sufficient.

Nevertheless, the court finds that defendants are entitled to more detailed information on some of the counts charged. They are entitled to "central facts," not unlimited discovery. *United States v. Johnson*, 524 F.Supp. 199, 207 (D.Del. 1981), *rev'd on other grounds*, 690 F.2d 60 (3d Cir.1982), *cert. denied*, 459 U.S. 1214, 103 S.Ct. 1212, 75 L.Ed.2d 450 (1983). To the extent that the government is able to do so, the precise date and place of each event alleged in the indictment should be provided. *United*

States v. Holman, 490 F.Supp. 755, 762 (E.D.Pa.1980). In addition, the names of all co-conspirators or participants in the alleged offenses should be provided, "except insofar as the Government can show, *in camera*, that such disclosures might endanger the safety of prospective witnesses." *Id.* The government is not obligated to provide uncharged overt acts and uncharged criminal conduct. *United States v. Armocida*, 515 F.2d 29, 55 (3d Cir.), *cert. denied*, 423 U.S. 858, 96 S.Ct. 111, 46 L.Ed.2d 84 (1975); *Johnson*, 524 F.Supp. at 207. These are not central facts to the offenses as charged. This ruling incorporates the granting of a bill of particulars as to defendants Harris and Majuri, discussed at II-F, G, of this opinion. Defendants' motion for a bill of particulars is granted in part and denied in part. Information is to be provided to the defense within 15 days of the date of the attached order; in the event that it is necessary for the government to make an *in camera* submission to the court, it shall be made within 10 days of the date of the attached order.

In conclusion, all motions for pre-trial hearings and compelled disclosure of discovery material, with the exception of the bill of particulars motion, are denied. The bill of particulars motion is granted in part and denied in part.

V. MOTIONS TO SUPPRESS

A. Individual Defendants' Motions To Suppress Fruits of Searches

Several defendants seek suppression of evidence under a theory that the relevant search warrants were not

supported by probable cause. The review of a magistrate's probable cause determination is not *de novo*, but rather deference is to be paid to the magistrate. *Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983). The magistrate is to consider the particular factors of each case in determining if a "substantial basis" for probable cause exists. *Id.* at 238-39, 103 S.Ct. at 2332-33. Where a defendant demonstrates an inadequacy of probable cause, the appropriateness of applying the suppression mechanism must be evaluated under the requirements of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Under *Leon*, suppression is not required where "an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Id.* at 920, 104 S.Ct. at 3419. Any one of the following conditions requires suppression under *Leon:* (1) where the affiant intentionally or recklessly misleads the magistrate; (2) where the magistrate abandons his or her objective judicial role; (3) where the affidavit is so lacking in probable cause that an officer could not reasonably rely on the warrant; (4) where the warrant utterly fails to meet particularization standards. *Id.* at 923, 104 S.Ct. at 3420; *see also United States v. Savoca*, 761 F.2d 292, 298 (6th Cir. 1985) (motel room search without sufficient probable cause upheld under *Leon;* "reasonably well-trained officer" could have concluded that probable cause was sufficient). Under these standards, the defendants' suppression motions challenging the search warrants and execution of such warrants are granted in part and denied in part as explained below.

1. Vastola Motion

Vastola challenges the probable cause finding in support of the search warrant of his home. The warrant identifies the objects of the search as follows:

> Fruits and instrumentalities of the crimes of extortion and mail and wire fraud including but not limited to cash received from extortion, records of loansharking and extortion, and a television set obtained by mail and wire fraud.

The court will first discuss the fruits of the mail and wire fraud and then the "fruits and instrumentalities of the crimes of extortion."

a. Fruits of Fire and Mail Fraud

The warrant lists only one item as a fruit or instrumentality of the mail and wire fraud: a television set. Vastola argues that Agent Mahoney made a material misrepresentation in regard to the television set by omitting language from the intercepted Brocco-Massaro conversation that placed the television in the Vastola home. *See* Affidavit of Special Agent John Mahoney, FBI, In Support of Application For Search Warrants, ("Mahoney Affidavit"). The court has reviewed the omitted language and finds that it is not material. It does indicate that a different television set was in the Vastola home than the one described in the language provided to the magistrate. However, the additional language does not undercut or negate the inference that Vastola possessed a stolen television set in his home, nor that the set was obtained pursuant to a fraudulent scheme. Paragraphs 68, 69, 81, and 82 of the Affidavit support this inference. The court

finds that the omission was neither material nor was it meant to deceive the magistrate. Therefore, defendant's request for a *Franks* hearing is denied, *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), and the motion to suppress the television set is denied.

b. Fruits of Extortion

There is no doubt that the Affidavit supports a finding of probable cause that Vastola was involved in extortionate activity. Mahoney Affidavit at ¶ 38. The allowable inferences from the intercepted conversations in paragraph 38 are further supported by the conclusions of the affiant and by the information provided to the affiant by an informant. The affiant is an experienced FBI Agent in the investigation of organized crime activities, ¶¶ 1, 2; and thus is entitled to some deference when performing expert analysis.

> Not only must the experience of an expert affiant in examining evidence which might appear non-incriminating to a lay person be given certain deference, but: " . . . courts have long recognized that in the context of eavesdropping, and otherwise ambiguous conversation may serve as a predicate for probable cause so long as it is reasonably interpreted."

U.S. v. Massino, 605 F.Supp. 1565, 1573 (S.D.N.Y. 1985), *reversed on other grounds*, 784 F.2d 153 (2d Cir. 1986) (citations omitted). The affiant states that John LaMonte told him that Vastola had threatened him pursuant to the payment of monies, and that Vastola was the beneficiary of the extortion of LaMonte. ¶¶ 40, 41; *see Gates*, 462 U.S. at 237-38, 103 S.Ct. at 2331-32 (tips from informants,

particularly when supplemented by independent police investigations, amount to significant information for the magistrate's probable cause determination).

Probable cause to believe that Vastola was involved in extortion does not necessarily amount to probable cause to search the home for fruits of the extortion.

> [T]he fact that there is probable cause to believe that a person has committed a crime does not automatically give the police probable cause to search his house for evidence of that crime. "If that were so, there would be no reason to distinguish search warrants from arrest warrants, and cases like *Chimel v. California*, . . . would make little sense." We have consistently held that facts must exist in the affidavit which establish a nexus between the house to be searched and the evidence sought. . . . However, that nexus may be established either through direct observation or through normal inferences as to where the articles sought would be located.

United States v. Freeman, 685 F.2d 942, 949 (5th Cir. 1982) (citations omitted), *see also* W.R. LaFave, Search and Seizure, § 3.1(b) at 547 & n. 34 (2d ed. 1987) ("The other side of the coin is that there may be probable cause to arrest a person for an offense involving the use of certain instrumentalities without there being probable cause to search that person's residence for them."); *id.* at 545 & n. 26 ("In the case of search warrants, the conclusions go to the connection of the items sought with crime and to their present location.") (citation omitted).

A review of the Mahoney Affidavit does not indicate a basis for a probable cause belief that fruits of the

extortion could be found in the Vastola home. The government in its brief specifically identifies those paragraphs in the Affidavit which allegedly support such a finding. Paragraph 38 contains excerpts from a wiretap implicating Vastola in the LaMonte extortion. Paragraph 40 and 41 state that LaMonte informed Agent Mahoney that Vastola was extorting him. Paragraph 81 contains a wiretap excerpt which could support an inference that Vastola possessed a television set in his home, stolen pursuant to a mail and wire fraud scheme. Paragraph 90 describes Vastola's home with particularity. Paragraphs 6, 8, and 91 state Agent Mahoney's conclusion that Vastola is at the center of a criminal organization. Paragraphs 28, 39, and 92 state Mahoney's conclusions that Vastola is involved in extortion. Paragraphs 68 and 82 state Mahoney's conclusions that Vastola is involved in a mail and wire fraud scheme, and paragraphs 68 and 81 indicate televisions are a part of this scheme. Paragraph 93 states Agent Mahoney's conclusions that "Vastola has in his residence items obtained by mail and wire fraud." Paragraph 94 states the following:

> For these reasons, there is probable cause to believe that a search of the residence of Gaetano Vastola could result in evidence being discovered, such a cash received from extortion, records of loansharking and extortion and goods obtained by mail and wire fraud, and handwritten notes conversations relating to the above.

Agent Mahoney's conclusion that evidence of the mail and wire fraud scheme (a stolen television) is supported by intercepted conversations. *See* Mahoney Affidavit at ¶¶ 69, 81. However, there is no support in the Affidavit for Agent Mahoney's conclusion that the home contains

fruits of the extortion. The Vastola home is mentioned in three paragraphs of the Affidavit. Paragraphs 81 and 93 pertain to fruits of the mail and wire fraud. Only paragraph 94 discusses the home in relation to fruits of the extortion, and it does so in a conclusory manner. *Cf. United States v. Washington*, 797 F.2d 1461, 1472-73 (9th Cir. 1986) (The fact that government failed to make any showing to the magistrate that the suspect ran an illegal business out of his home was one of three reasons cited by the court in suppressing evidence seized from the home on the basis of an overbroad warrant.).

Gates teaches that conclusory statements alone cannot give rise to a probable cause finding. 462 U.S. at 239, 103 S.Ct. at 2333 ("Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."). While deference may be paid to an expert affiant, *United States v. Massino*, 605 F.Supp. at 1573, that deference cannot overcome a total lack of explanation of a conclusion. The evidence in the Mahoney Affidavit concerning the location of the fruits of the extortion is not ambiguous, it is totally absent.

The *Leon* standards indicate that suppression is an appropriate remedy where an officer relies on a "warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *Leon*, 468 U.S. at 923, 104 S.Ct. at 3421 (citations omitted). The court finds that the conclusory statement by Agent Mahoney linking the fruits of extortion to Vastola's home, without any evidentiary support in the Affidavit, cannot serve as a basis for a reasonable belief that probable cause has been demonstrated. *Cf.*

Washington, 797 F.2d at 1472-73; *United States v. Nader*, 621 F.Supp. 1076, 1084 (D.D.C. 1985) (post-*Leon* case applying exclusionary rule based on failure to particularize).

Under *United States v. Christine*, 687 F.2d 749, 760-61 (3d Cir.1982), this court must determine which clauses in the warrant are supported by probable cause and which are not. This court concludes that the clause authorizing a search for "fruits and instrumentalities of the crimes of extortion . . . " is invalid and the clause authorizing the search for "a television set . . . " is valid. Therefore, items seized pursuant to the search for the fruits of extortion must be suppressed. *Christine*, 687 F.2d at 754 ("Materials seized under the authority of those parts of the warrant struck for invalidity must be suppressed, but the court need not suppress materials seized pursuant to valid portions of the warrant."); *see also United States v. GomezSoto*, 723 F.2d 649, 654 (9th Cir.), *cert. denied*, 466 U.S. 977, 104 S.Ct. 2360, 80 L.Ed.2d 831 (1984).

The parties have not provided relevant facts nor briefed legal arguments pertaining to the plain view and inevitable discovery doctrines. *See generally Washington*, 797 F.2d at 1468-69. To the extent they are applicable, the government is instructed to brief the issue within 10 days of this order; the defense is to respond within 20 days of this order.

2. Saka Motion

Saka challenges the search warrants and the underlying affidavit for his business (Video Warehouse), home, and car, on the theory that there was no particularization of the copyright fruits and instrumentalities to be seized.

The challenge applies only to copyright items and not fruits of other criminal activities named in the warrants. The copyright fruits were described in slightly different terms in each warrant. The critical language in each warrant is a variation on "illegally reproduced copyrighted tapes and records. . . . " The government argues that the warrants read in conjunction with the affidavit are sufficiently particularized. Although the challenge demands a difficult probable cause determination based on the facts of this case, the court finds the motion must be denied.

The particularization requirement is fundamental to fourth amendment law. *Washington*, 797 F.2d at 1471-72; *Savoca*, 761 F.2d at 296. "General warrants by failing to describe particularly the things to be seized, create a danger of unlimited discretion in the executing officer's determination of what is subject to seizure and a danger that items will be seized when the warrant refers to other items". *Savoca*, 761 F.2d at 299 (citation omitted). The particularity concept must be applied in the case at bar to the specific task of distinguishing illegal copyrighted tapes from legal (public domain) tapes. *Cf. Washington*, 797 F.2d at 1472, ("Thus, if items that are illegal or fraudulent are sought, the warrant must contain some guidelines to aid the officers in deciding what may or may not be seized.") (citation omitted).

A number of courts have applied the particularization requirements in context of a search for copyrighted records and tapes. This court finds the first circuit's approach articulated in *United States v. Klein*, 565 F.2d 183, 186-87 (1st Cir. 1977), to be most instructive. *Klein* concerned the search and seizure of unauthorized reproductions of copyright tapes ("pirate" tapes), as does the case

at bar. The *Klein* warrant authorized the executing officer to seize "certain 8-track electronic tapes and tape cartridges which are unauthorized pirate reproductions. . . . " 565 F.2d at 184. The fundamental flaw identified in the warrant and affidavit was that "the warrant failed to provide any before the fact guidance to the executing officers to which tapes were pirate reproductions." *Id.* at 188. The *Klein* court also identified a failure on part of the government of establish that there was a large collection of contraband on the defendant's premises. *Id.* Of further significance to the court, was their observation that the relevant information required could have easily been obtained and provided to the magistrate. *Id.; see also United States v. Cook*, 657 F.2d 730, 734 (5th Cir. 1981) ("If a law enforcement officer has a list of the property on the premises, he can determine what is likely to be illegal or evidence of illegality, and the magistrate may easily direct seizure of that property only without unnecessarily interfering with other property of the possessor."). The *Klein* court affirmed the district court suppression of the tapes seized. *See also Montilla Records of Puerto Rico, Inc. v. Morales*, 575 F.2d 324, 327 (1st Cir. 1978); *Cook*, 675 F.2d at 734. *But see E-C Tapes, Inc. v. Kelly*, 412 F.Supp. 245, 249 (N.D.Ill.1975).

The case at bar presents an extremely close question. The government clearly had evidence amounting to probable cause that Saka was involved in copyright violations while operating out of Video Warehouse, Affidavit at ¶¶ 54, 56, 57, 59, 64, and that fruits of that activity could be found a Video Warehouse, his residence, ¶ 66, and in his

car, ¶65. However, the warrant and the affidavit are lacking in the statement of a mechanism by which the executing officer can distinguish illegal tapes from legal tapes.

The government attempts to distinguish *Klein* on the facts, because in *Klein* reliance on experts at the scene of the search and seizure had not been demonstrated. *See Klein*, 565 F.2d F.2d at 186-87 & n. 5 ("Furthermore, there is no indication on the face of the warrant that the people executing the warrant would be experts in the field."). The government's distinction proves too much. The government argues in its brief that, "[i]n this case [the case of Saka], such an expert was referred to in the affidavit and was available at the scene to assist the seizing agents." MOL of United States in Opposition 135. However, even if the mere presence of an expert was presumed to be an adequate showing of a mechanism to differentiate legal from illegal tapes, the Affidavit does not in fact support the assertion that such an expert was to be on the scene. No representation to the effect was made to the magistrate who issued the warrant. The reference in the Affidavit to the expert is silent as to his intended role in the search, or his ability to differentiate legal from illegal tapes. *See* ¶ 65. The court does not disagree with the government's after the fact explanation that a list detailing every tape to be seized was unnecessary, nor that a screening of the tapes at the scene was impractical due to the volume seized. However, these explanations do not substitute for a showing of particularization that must be made to the magistrate. *See Klein*, 565 F.2d at 186 & n. 4 ("It is of course, rudimentary that the validity of the warrant must be appraised by the facts revealed to the

magistrate and not those later found to exist by executing officers.") (citation omitted).

Review by the district court is not *de novo*, *Gates*, 462 U.S. at 235, 103 S.Ct. at 2330; if it were, this court has little doubt that it would find the government failed to meet its particularization requirement. In the role of a reviewing court, this court finds that the affidavit does provide sufficient information to support a probable cause inference that the illegal copyright items constituted a "dominant" element of the tape inventory. *See United States v. Cortellesso*, 601 F.2d 28, 32 (1st Cir. 1979), *cert. denied*, 444 U.S. 1072, 100 S.Ct. 1016, 62 L.Ed.2d 753 (1980) (applying the *Klein* standards to a search for stolen goods, clothing items identified as "men's suits, sports jackets, women's boots, leather coats, fur coats . . . ," holding that particularization requirements change in a context where there is evidence of "a large collection of stolen goods [obtained] through a facade of legitimacy.") (citation omitted). The *Cortellesso* court ruled that a generic class of items to be seized was acceptable, because the magistrate was not required to speculate as to whether the executing officers could make the necessary distinctions. *Id.* at 32 ("There was a great likelihood that the goods to be seized would be indeed stolen.") (citation omitted).

In the case at bar, the magistrate was presented with sufficient evidence to support an inference that Video Warehouse was, in fact, an operation engaging in a range of criminal activities with a front of legitimacy. The warrant and Affidavit address at least five types of criminal activity. The specific evidence on copyright violations demonstrate a large scale video duplicating enterprise,

¶¶ 53, 54 ("300-400 machines, VCR's and discussed running 100 slaves from one master"). There was adequate evidence to suggest (1) that the enterprise was involved in illegal duplication, ¶¶ 54, 56, 57, 59, 64; (2) that four illegally copyrighted tapes were identified by name, ¶¶ 57, 59; and (3) that 13 other tapes were illegally duplicated (supported by undercover surveillance and expert investigation), ¶¶ 64, 65. Taking all these elements in combination, the Affidavit provided a reasonable basis for the seizure of all videotape instrumentalities on the premises. This court is instructed to review the warrant "in a common sense and realistic fashion." *United States v. Ventresca*, 380 U.S. 102, 108-09, 85 S.Ct. 741, 745-46, 13 L.Ed.2d 684 (1965). Although the specific factual predicate for the copyright section of the warrant is poorly developed, and there is no doubt that the government could have reasonably provided the magistrate with more specific information, this court finds on balance that there was no violation. Defendant's motion to suppress is denied.

3. Majuri Motion

Majuri seeks suppression of two firearms seized from his home, based on contentions that the warrant was not supported by probable cause, that the information supporting the warrant was stale, and that the search exceeded the scope of the warrant. For the reasons stated below, defendant's motion is denied. The Mahoney Affidavit contains intercepted phone conversations between Majuri and Massaro alluding to gambling activities. ¶¶ 14, 18, 21. The affiant, based on his experience, is entitled to interpret language and activities not generally familiar

to a lay person for consideration by the magistrate. *United States v. Massino*, 605 F.Supp. at 1573. The affiant concluded that the intercepted conversations between Majuri and Massaro concerned a gambling operation. ¶ 22. The Affidavit also established a link between Majuri's gambling activities and his home. Each gambling conversation noted above was made to Majuri at a phone listed to Joan Majuri at the street address which was searched. The affidavit also describes additional intercepted conversations between Massaro and others indicating that Massaro was involved in illegal gambling. ¶¶ 10, 12, 16, 24, 25. Finally, Agent Mahoney stated that a confidential informant, which a track record or reliability, had provided gambling information on Majuri as late as September 23, 1985. This information supports a finding that evidence of illegal gambling activities could be found at Majuri's home.

Majuri also challenges the warrant on the basis of staleness. The Affidavit was filed with the magistrate on October 7, 1985, and the warrant issued October 16, 1985. The information obtained by electronic surveillance was intercepted over a two-month period from December, 1984, to January, 1985. ¶¶ 14, 18, 21, 26. Although this information tends to support a continuing pattern of criminal activity, it alone would not support a warrant issued some ten months later. *See United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972). However, the affiant stated that he received confidential information as late as September 23, 1985, that Majuri was involved in illegal gambling. It is not clear from the Affidavit to what time period the confidential information pertained. However, this tip amounts to a showing upon which the magistrate

was entitled to base a probable cause finding because it was rendered by a reliable informant and supported by information obtained in the wiretap during the December, 1984-January, 1985 period.

Finally, Majuri challenges the scope of the search. He alleges that the guns were seized in the basement, an area of the house controlled by Carmella Majuri, not the defendant Charles Majuri. The warrant did not specify sections within the house, and could reasonably be read to cover the whole house. The officer who was involved in the search has stated that he was aware that Majuri was a convicted felon. Affidavit of William Eichhorn, July 16, 1987. This information need not have been presented to the magistrate, since the guns were seized when spotted in plain view while executing a valid search for gambling instrumentalities. *See generally Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319, 3324, 77 L.Ed.2d 1003 (1983). Because the searching officer was aware that Majuri was a convicted felon, possession of firearms in evidence of criminal activity. Furthermore, Majuri's argument that the basement was outside an area of his control is without merit. Even if accepted as true, the argument fails because Majuri would be without standing to bring it. *See generally Rawlings v. Kentucky*, 448 U.S. 98, 106, 100 S.Ct. 2556, 2562, 65 L.Ed.2d 633 (1980) (defendant had no legitimate expectation of privacy as to the property that was searched). In conclusion, Majuri's motion to suppress is denied.

4. Brocco Motion

Brocco seeks suppression of the fruits of the search of his home on a "taint" theory based on assertions of an

illegal electronic surveillance of the residence. This court finds Brocco's arguments to suppress the electronic surveillance to be without merit. *See* Part V-B-1 of this opinion. Therefore, the motion suppress fruits of the search is denied.

B. Defendants' Joint Motion to Suppress Electronic Surveillance

The defendants' joint electronic surveillance suppression motion challenges all of an extraordinary volume of electronic surveillance interceptions. For the reasons stated below, this court finds that the defendants' motion to suppress is granted in part and denied in part.

This court finds that three theories of suppression are applicable in this case. Where the government's showing of probable cause rests on the bare conclusions of affiants, suppression is appropriate. *Gates*, 462 U.S. at 239, 103 S.Ct. at 2332. Where the government obtains surveillance extensions which are derived form prior orders found to be illegally authorized, suppression of the fruits of the extension is also required. *United States v. Giordano*, 416 U.S. 505, 533, 94 S.Ct. 1820, 1835, 40 L.Ed.2d 341 (1974). Where the government obtains a surveillance order based on information that is not independent of "taint," the fruits of such surveillance must be suppressed. *United States v. Plotkin*, 550 F.2d 693, 696 (1st Cir.), *cert. denied*, 434 U.S. 820, 98 S.Ct. 61, 54 L.Ed.2d 76 (1977).

1. The Government's Electronic Surveillance Did Not Constitute A General Search

The federal electronic surveillance statute, 18 U.S.C. § 2518 *et seq.*, balances the fourth amendment privacy

rights of individuals against the interest of the government in law and order, granting law enforcement officers broad but circumscribed powers. To obtain a court order approving electronic surveillance, law enforcement officers must show probable cause to believe that conversations concerning certain offenses will be intercepted at certain locations, and show that electronic surveillance is needed to investigate these offenses. 18 U.S.C. § 2518(3). Interceptions must be limited to those ordered by the court. 18 U.S.C. § 2518(5). A surveillance order must be correctly authorized, and it must be correctly executed. The government must adequately justify the extent of intrusion that it requests, and then it must limit itself to that scope once a court approves its request.

In this case defendants claim that electronic surveillance orders have been ordered with regard to so many persons and offenses that the government has, in effect, executed an unconstitutional general search, an "unauthorized invasion" of defendants' privacy. *Berger v. New York*, 388 U.S. 41, 58, 87 S.Ct. 1873, 1883, 18 L.Ed.2d 1040 (1967) (overturning a New York wiretap statute for permitting "indiscriminate use" of electronic surveillance). The defendants neither show that this volume of electronic surveillance violated the provisions of the statute, nor do defendants challenge the constitutionality of the statute's protection for privacy interests. *See generally Berger*, 388 U.S. 41, 87 S.Ct. 1873. Therefore, the defendants fail to marshall appropriate arguments to support their claim that an unconstitutional "general search" was executed.

Similarly, the defendants argue that many of the individual surveillance applications lacked a substantial

showing of probable cause (which the defendants gauge as "percent" probable cause.). The defendants believe that a probable cause linking should be shown between a certain percentage of individuals named in a surveillance application and a certain percentage of offenses named in the application before a valid surveillance order should issue. However, the defendants fail to demonstrate any support for this position in the statute, in the case law, or in public policy. The statute on its face requires that the identities of persons whose communications are to be intercepted must be listed *if* those persons are known. 18 U.S.C. § 2518(1)(b)(iv) & (4)(a) (emphasis added). Anyone, even unidentified persons, may be monitored so long as known persons are listed. *United States v. Kahn*, 415 U.S. 143, 157, 94 S.Ct. 977, 985, 39 L.Ed.2d 225 (1974); *United States v. Tehfe*, 722 F.2d 1114, 1117 (3d Cir.1983), *cert. denied*, 466 U.S. 904, 104 S.Ct. 1679, 80 L.Ed.2d 154 (1984). Naming persons who are expected to be intercepted, but who are not suspected of illegal activity, comports with the public policy behind the notice provision of the electronic surveillance statute, § 2518(8)(d). *United States v. Martin*, 599 F.2d 880, 885 (9th Cir.), *cert. denied*, 441 U.S. 962, 99 S.Ct. 2408, 60 L.Ed.2d 1067 (1979). Conversations involving persons known or unknown may be monitored only for so long as is necessary to intercept conversations concerning the particular criminal activities during the period authorized for interception by the court. § 2518(5). Section 2518(3)(c) merely requires a showing of probable cause that some individual is connected to an offense in order to authorize the interception of unknown persons' communications involving that offense that originates from a particular facility. *Kahn*, 415

U.S. at 155 n. 15, 94 S.Ct. at 984 n. 15; *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 558, 98 S.Ct. 1970, 1977, 56 L.Ed.2d 525 (1978) (citing *Kahn* to uphold a search warrant for a particular facility that did not name particular persons). The court again finds that the defendants' argument that these surveillances constitute a general search is without merit.

2. Probable Cause and the New Jersey Surveillances

a. The November 28, 1984 Surveillance at the Massaro Residence

The standard of review for findings of probable cause sufficient to justify the issuance of a search warrant is the "totality of the circumstances" doctrine set forth in *Gates*. *Gates*, 462 U.S. at 238, 103 S.Ct. at 2332. *Gates* softened the strict informant reliability tests previously required under the Court's opinion in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969). *Gates* requires merely enough corroboration of an informant's testimony through other sources in order to demonstrate some basis for the informant's reliability. *Gates*, 462 U.S. at 244, 103 S.Ct. at 2335. In the initial Massaro surveillance application, confidential informant B's information about Massaro's bookmaking activities is corroborated by confidential informant A's information, by visual surveillance, and by telephone usage patterns, all of which tend to establish B's general reliability as an informant. His description of "scam" gambling games to be held by the wiretap targets, including the involvement of loansharks, contains sufficient detail to allow the magistrate to rely

on this tip. *Spinelli*, 393 U.S. at 416, 89 S.Ct. at 589. Thus, Judge Breitkoph's order authorizing electronic surveillance of communications involving gambling, usury, and theft by deception (scam gambling games), over Massaro's telephone lines was supported by adequate findings of probable cause.

b. The December 5, 1984 Amendment, and the December 14 and 24 Extensions of the Massaro Surveillance

The affiant for the Massaro surveillance applications, Investigator Codelensky, presented a tip from informant B indicating that certain individuals were engaging in theft, i.e., the illegal duplication of videotapes ("video bootlegging"). The tip was corroborated by incidentally intercepted conversations from the Massaro surveillance (i.e. discussions concerning the duplication of wholesale quantities of videotapes for low prices to be shipped in passenger-car trunks). This information meets probable cause requirements to authorize surveillance for theft. *Gates*, 462 U.S. at 244-45, 103 S.Ct. at 2335-36.

Subsequent Massaro surveillance extensions were properly ordered. Extension applications presented information in addition to that which was sufficient in the initial order and amendment to establish probable cause for gambling, usury, theft by deception, and theft ("video bootlegging"). *United States v. Vasquez*, 605 F.2d 1269, 1273 (2d Cir.), *cert. denied*, 444 U.S. 981, 100 S.Ct. 484, 62 L.Ed.2d 408 (1979).

c. The Union County Prosecutor's Video Warehouse Electronic Surveillance Order, Amendment, and Extensions

Despite the defendants' assertions that the videotape duplication business operating as the Video Warehouse was entirely legal, and could be viewed as legitimate based upon the facts presented by the electronic surveillance applications, this court accepts Judge Breitkopt's determination that probable cause supported his December 12, 1984 order authorizing electronic surveillance to investigate theft ("video bootlegging") at Video Warehouse. As previously discussed for the Massaro residence surveillance, informant B's tip corroborated by other evidence suggestive of that illegal activity is sufficient to support a finding of probable cause, even if "innocent" explanations for surveillance targets' activities can be imagined. *Gates*, 462 U.S. at 243 & n. 13, 103 S.Ct. at 2335 & n. 13.

The December 20, 1984 amendment, and December 31, 1984 and January 11, 1985 extensions are similarly supported by findings of probable cause. A magistrate considering the informant's tips (as discussed in part 2(a) above), and relevant interceptions over the Massaro wiretap, could conclude that there was probable cause that conversations concerning gambling and theft would be intercepted through electronic surveillance at the Video Warehouse during this period. *Id.* at 230, 103 S.Ct. at 2328.

d. The New Surveillance at Video Warehouse, Amendment and Extensions

Defendants suggest that the January 24, 1985 application for a new Video Warehouse surveillance order was

misleading because it included conclusions not supported by the facts presented. It is the issuing court's conclusions, however, not the applicant's conclusions, however, not the applicant's conclusions, that are subject to review. The issuing judge need not endorse all of the applicant's conclusions in order to find sufficient probable cause to authorize a surveillance. *Armocida*, 515 F.2d at 41 (affiant's "conclusion" is not a "fact" which can be tested for misrepresentation). Based upon the totality of credible factual information offered in this application, this court finds that electronic surveillance to investigate bribery and corrupt influence, theft, and usury and properly authorized.

There was sufficient information in the January 24, 1985 application concerning financial connections and apparent undue influence between various individuals awarding and bidding for government construction contracts to arrive at a finding of probable cause to believe that bribery and corrupt influence were taking place. In particular, information in the application suggests that (1) James Kehoe was project manager for the government's Earl Naval Weapons Station construction project (Criminal Action Application Pursuant to N.J.S. 2A:156A-9 at ¶31 (January 24, 1985)) ("January 24 Application"); (2) Kehoe was providing "inside" information to assist certain other surveillance targets' attempts to obtain Earl Naval Weapons Station construction contracts, in exchange for a percentage of the proceeds (January 24 Application at ¶19); (3) Kehoe provided his only set of plans for at least one construction project for surveillance targets' use (January 24 Application at ¶31). From this information a magistrate could find probable cause to

properly authorize interception of conversation concerning bribery and corrupt influence.

Information suggesting loansharking activity in prior affidavits, combined with the February 6, 1985 conversations between Massaro and Kehoe (Criminal Action Application for Extension and Amended Orders Pursuant to N.J.S. 2A:156a-9/N.J.S. 2A:156A-12 (February 13, 1985)), which strongly suggests a usurious loan, establishes probable cause for interception of conversations concerning usury pursuant to the February 13 amendment and extension of the New Video Warehouse order.

The sufficiency of a showing of probable cause under New Jersey law for a new "order to intercept a communication of a person or on a facility which was the subject of a previous order" ("repeat order"), N.J.Stat.Ann. § 2A:156-10(f), as distinguished from "a renewal or extension" of a previous order, *id.*, appears to be a matter of first impression of this court. A showing of probable cause sufficient for a repeat order must be "based upon new evidence or information different from and in addition to the evidence or information offered to support to prior order." *Id.* In the instant application, the only "new" probable cause information which had not been incorporated in the applications for the prior Video Warehouse order and its extensions is explicitly concerned with the bribery and corrupt influence offenses. Additional information concerning gambling, conspiracy, and usury, is incorporated by reference to the Majuri and Killeen electronic surveillance applications.

The defense argues that the January 24 application has not met the statutory requirement that probable cause

information in addition to that used to support the original order must be presented in order to repeat surveillance after two extensions have been granted. However, on its face, the § 2A:156-10(f) requirement to present probable cause information different from that "offered to support the prior order" can be satisfied with information incorporated by reference to applications for extensions to the prior order. The applications for the December 20, 1984 amendment, and December 31, 1984, and January 11, 1985 extensions to the original Video Warehouse order, incorporated by reference in the January 25, 1985 renewal application, do contain "information different from and in addition to" that found in the application for the original order. This information includes interceptions pursuant to the order itself. The statute clearly differentiates between an application for an order and an application for renewal or extension of an order. N.J.Stat.Ann §§ 2A:156A-9(d), 2A:156A-10(f); *Vasquez*, 605 F.2d at 1277 (New Jersey "set[s] the standards for issuance of a 20-day order higher than those governing issuance of a 10-day extension.") (footnote omitted). This court holds, therefore, that additional probable cause could be found, for the new order to authorize interception of conversations concerning the offense of theft, based upon "new" information incorporated by reference to the prior extension applications. Such information satisfies the requirement than a greater showing of probable cause than that originally offered be presented in order to obtain a new order. *Id.*

Pursuant to N.J.Stat.Ann. § 2A:156A-12(f), law enforcement officers properly instructed their monitors to sharply reduce eavesdropping of theft conversations to

those minimally necessary to fulfill their newly stated objective of merely tracking developments regarding video duplication activities. *New Jersey v. Catania,* 85 N.J. 418, 434, 427 A.2d 537, 545 (1981) ("police must make reasonable efforts to minimize intrinsically [through monitoring] as well as extrinsically"); *cf. United States v. Harvey,* 560 F.Supp. 1040, 1058 (S.D.Fla.1982), *aff'd,* 789 F.2d 1492 (11th Cir.), *cert. denied,* ___ U.S. ___, 107 S.Ct. 190, 93 L.Ed.2d 123 (1986) (continuing electronic surveillance is permitted for the purpose of determining "the scope of the conspiracy and the identity of the individuals involved") (*citing United States v. McCoy,* 539 F.2d 1050, 1056 (5th Cir.1976), *cert. denied,* 431 U.S. 919, 97 S.Ct. 2185, 53 L.Ed.2d 230 (1977)).

Extensions with regard to theft, bribery and corrupt influence, and usury, were also properly granted pursuant to 18 U.S.C. § 2518(1)(f) and N.J.Stat.Ann. 2A:156A-9(d) upon reporting the results of the ongoing surveillance in the extension applications.

e. The Brocco Residence Surveillance

Information from applications for the Massaro and Video Warehouse applications, incorporated by reference into the Brocco application, establish ample probable cause to believe that conversations concerning theft and bribery and corrupt influence would be intercepted over Brocco's telephone lines for the reasons stated in detail in part 2(e) above. Additional information presented in the Brocco application reinforces this finding. It is noted that

a magistrate could find probable cause to intercept conversations regarding video bootlegging despite the likelihood that legitimate tape duplicating was also taking place.

Extensions of the Brocco surveillance were supported by the findings of probable cause in the initial order, supplemented by the results thus far obtained from the surveillance, which were properly reported in the extension applications pursuant to 18 U.S.C. § 2518(1)(f) and N.J.Stat.Ann. 2A:156A-9(d). Thus, the extensions were properly granted.

f. The Killeen and Majuri Residences Surveillance

Visual and electronic surveillance evidence reported to support these applications is somewhat ambiguous. However, considering the totality of circumstances, including the incorporation by reference of the Massaro and Video Warehouse applications that this court has reviewed and approved (part 2(e) above), a substantial basis was established for a finding of probable cause to intercept conversations concerning the offenses of conspiracy and promoting gambling at both locations, and usury at the Killeen residence.

g. The March 14, 1985 Federal Video Warehouse Surveillance

The affidavit for the March 14, 1985 order authorizing electronic surveillance at Video Warehouse demonstrates a plausible organization connecting a number of

the surveillance targets to a number of offense. The issuing magistrate could find that probable cause supports the government's belief that a racketeering organization was operating from the Video Warehouse.

Probable cause for narcotics interceptions was established by an informant's tip corroborated by evidence of surveillance targets' activities which might otherwise seem "innocent" of wrongdoing. *Gates*, 462 U.S. at 243 & n. 13, 103 S.Ct. at 2335 & n. 13. Probable cause for mail and wire fraud (construction bid rigging) was established in the same manner as has been discussed for the Union County Video Warehouse surveillance (bribery and corrupt influences), discussed herein at part 2(e). Probable cause for all of the elements of 18 U.S.C. § 892, extortionate extensions of credit, including legally unenforceable credit transactions, usurious interest rates, reputation for the use of extortionate means (criminal convictions), and credit exceeding $100, was shown through an informant's tip, corroborated by previous interceptions and other information.

The government has demonstrated that named targets of this surveillance had conducted gambling activities continuously between September, 1984 and January 3, 1985. This court notes that this gambling activity was of a sufficiently "protracted and continuous nature" such that there was probable cause for the interception of gambling conversations as of March 14, 1985. *Tehfe*, 722 F.2d at 1119.

h. The April 16, Video Warehouse Order

The April 16 Video Warehouse extension properly ordered surveillance for extortion, gambling, narcotics,

and wire fraud/mail fraud (construction contracts). The March 14 Video Warehouse application, incorporated by reference into the April 16 application, established probable cause for these offenses. The April 16 application reports the results thus far obtained by the ongoing surveillance, without significant bias, pursuant to 18 U.S.C. § 2518(1)(f). The court reserves opinion on the suppression of interceptions pertaining to theft from interstate shipment and wire fraud/mail fraud with regard to illegal tape duplication ("videoduplicating"), pending further argument scheduled for September 8, 1987.

i. The May 14 Video Warehouse Order

Ample probable cause for interception of conversations concerning narcotics, gambling, extortion, and wire fraud/mail fraud (construction), has been established by incorporation of prior applications and presentation of subsequent interceptions. Ample probable cause also existed for the interceptions of conversations concerning Western Union Access codes. The April 16 Affidavit (Extension) provides indicia of wrongdoing adequate to support a probable cause finding as to Western Union fraud. Agent Dossett described specific telephone conversations from Video Warehouse where Massaro, Sr. and Massaro, Jr. discussed Stone's attempt to combine access numbers to find a new code. ¶ 57. Paragraph 56 provides evidence of codes being used that do not work. The May 14, 1985 Affidavit (Second Extension) includes further evidence of a pattern of trying out different access numbers. Such evidence provides the substantial basis to

the judicial officer for uncovering evidence of wrongdoing that is required by *Gates*, 462 U.S. at 236, 103 S.Ct. at 2331.

The court reserves opinion on suppression of surveillances of theft from interstate shipment, and mail/wire fraud (video bootlegging and "bust-out") pending further argument.

j. The June 26 Video Warehouse Order

The government's investigation of narcotics, gambling, extortion, wire fraud/mail (construction contracts) and Western Union fraud at the relocated Video Warehouse operation is essentially identical to that a the previous location. These may be considered ongoing activities involving the same participants. Probable cause to intercept conversations concerning these activities has been amply established by the preceding federal Video Warehouse applications (incorporated by reference) and supplemented by later interceptions. The court reserves opinion on the suppression of interceptions pertaining to wire/mail fraud (video duplicating and "bust-out") and theft from interstate shipment, pending further argument.

k. The July 25 Video Warehouse Order

The court reserves opinion on the suppression of interceptions pertaining to theft from interstate shipment, and mail/wire fraud (video bootlegging and "bust-out") pending further argument. Defendants' motion to suppress is denied with respect to all other interceptions.

3. Defendants' Request For A Franks Hearing

The defendants have not demonstrated inaccuracies, omissions, or misrepresentations, in the electronic surveillance applications which could be regarded as necessary to the issuance of any of the surveillance orders. Thus, defendants are not entitled to a *Franks* hearing to test the validity of any of the surveillance orders. *Franks*, 438 U.S. at 171-72, 98 S.Ct. at 2684-85.

4. Failure to Exhaust Ordinary Investigative Means

Defendants claim that, in several instances, the government failed to meet its obligation to demonstrate that it had exhausted ordinary means of investigation before requesting electronic surveillance. 18 U.S.C. § 2518(3)(c). This claim is without merit. The government is not required to attempt every possible alternative means short of electronic surveillance, but merely to show what has been tried and to state its estimation of the probable success of other methods. *See Armocida*, 515 F.2d at 38 ("To support a finding that normal investigative procedures are unlikely to be successful, [2518(3)(c) only requires] a factual predicate in the affidavit.") In particular, the defendants argue that the government should have questioned those persons engaging in transactions with surveillance targets in order to determine if these activities are legal. Such a course would not only be unlikely to provide significant information about the details behind these activities, but would also be likely to expose the ongoing investigation. Here, the defendants'

argument is not pertinent to a proper showing of alternative investigatory means so much as it is a criticism of the government's showing of probable cause to believe that the defendants' activities were illegal.

The surveillance targets were engaged in elaborate transactions which did not appear within plain view. A "sting" operation would not have been as likely to provide information about the identities of all of the persons involved in various activities and the scope of their involvement. A magistrate could have found that electronic surveillance was needed to investigate the extent of these activities. Additional information about the extent to which LaMonte was providing or willing to provide personal information regarding the surveillance targets and their activities would not have affected this finding. The government's electronic surveillance applications put forward sufficient detail about the pursuit of alternative investigative means to convince a magistrate that electronic surveillance was needed to pursue legitimate investigatory goals. *Gates,* 462 U.S. at 236, 103 S.Ct. at 2331.

5. Delay in Sealing the Fruits of the March 25, 1985 Video Warehouse Order

The government admits that the tape recordings of interceptions pursuant to the March 25, 1985, Video Warehouse surveillance were not sealed until July 15, 1985, but claims that this violation of the statutory requirement that tapes be sealed immediately following "the conclusion of one continuous period of surveillance," *Persico,* 621 F.Supp. at 865, does not mandate suppression.

"[F]ailure to seal the tapes promptly is not such a violation that requires suppression as a matter of law. . . . The crucial factor, however, is the integrity of the tapes themselves." *United States v. Falcone*, 505 F.2d 478, 484 (3d Cir.1974). In *Falcone*, the trial court held an evidentiary hearing to determine the integrity of the tapes. Where the integrity of the tapes is not in dispute, "a delay in sealing the tapes is not, in and of itself, sufficient reason to suppress the evidence obtained therefrom." *Id.* In the case at bar, the integrity of the tapes has not been questioned, and thus suppression is not mandated. Similarly, the delay in sealing two reels of tape until August 19, 1986, caused by clerical error, does not require suppression.

6. The Maryland Surveillance Orders

a. The March 19 Surveillance Order

The March 19 Maryland surveillance order properly authorized the interception of conversations regarding wire fraud and extortion. Contrary to the defendants' attempt to demonstrate governmental misrepresentations in the electronic surveillance applications concerning surveillance targets' narcotics activities, the presentation or omission of probable cause information regarding narcotics, which is named as an offense in the succeeding surveillance order but not in the March 19 order, is irrelevant to the appropriateness of surveillance regarding wire fraud and extortion. This is not a subterfuge search, *United States v. McKinnon*, 721 F.2d 19, 23 & n. 2 (1st Cir.1983), but a surveillance order based upon a substantial basis for probable cause to believe that conversations

concerning wire fraud and extortion would be intercepted over the designated telephone lines. The applications' discussion of suspected narcotics activities is therefore irrelevant to the validity of this order.

The precision and attention to detail displayed in the government's showing of exhaustion of ordinary investigatory means, without significant misrepresentation with regard to the offense to be surveilled, tends to support the applicant's claim that electronic surveillance was needed to further the government's investigation.

b. The April 23, 1985 Extension of the Maryland Surveillance

When conversations are electronically monitored which clearly relate to illegal activities, law enforcement officers may intercept these conversations and subsequently apply for judicial authorization to intercept them, pursuant to 18 U.S.C. § 2517(5). Incidental interception of original surveillance order was permissible because the original March 19 surveillance was not a "subterfuge search." *McKinon*, 721 F.2d at 23 & n.2; *accord, United States v. Gambale*, 610 F.Supp. 1515, 1528 (D.Mass.1985). Law enforcement officers' clear indication in the original application that they expected to intercept narcotics conversations pursuant to that order, although they lacked probable cause to intercept, suggests candor rather than subterfuge. Authorization to intercept narcotics conversations was properly sought after these conversations began to be intercepted. *United States v. Masciarelli*, 558 F.2d 1064, 1067-68 (3d Cir.1977); *accord United States v.*

Gerena, 653 F.Supp. 974, 982 (D.Conn.1987). A substantial showing of the need for electronic surveillance to investigate the scope of narcotics activities was also supplied. *United States v. Tufaro*, 593 F.Supp. 476, 491 (S.D.N.Y.1983), *aff'd*, 762 F.2d 991 (2d Cir.), *cert. denied*, 474 U.S. 826, 106 S.Ct. 84, 88 L.Ed.2d 69 (1985); *United States v. Baynes*, 400 F.Supp. 285, 299-300 (E.D.Pa.1975).

7. New York Federal Surveillance

Defendants argue that the omission of detail in the Roulette Records surveillance application concerning John LaMonte's willingness to cooperate with the government investigation, particularly his willingness to provide consensual recordings, mandates suppression of the fruits of that surveillance. This court holds that suppression is not required. The issuing magistrate's finding that alternative investigatory means were not available would not have been affected by the knowledge that LaMonte was willing to make consensual recordings. *See United States v. Ippolito*, 774 F.2d 1482, 1486-87 (9th Cir. 1985). Such recordings would be no more likely than LaMonte's own testimony to reveal the scope of the alleged extortionate operation's activities outside of Lamonte's personal knowledge. It was reasonable for the magistrate to conclude that conversations to be intercepted between alleged participants would yield evidence relevant to the extortion of LaMonte, information not otherwise made available by calling LaMonte as a cooperating witness or by simply recording LaMonte's conversations with alleged participants. In this respect, the defendants' motion to suppress is denied.

Defendants also argue that the omission of reference to prior Union County surveillance orders in the application for the Roulette Records surveillance mandates suppression pursuant to the requirement of 18 U.S.C. § 2518(1)(e) that "all previous applications know to the individual authorizing and making the application . . . involving any of the same persons, facilities, or places specified in the [subsequent] application" must be identified in the subsequent application. However, if the omission is unintentional, suppression is not required. *United States v. Van Horn*, 789 F.2d 1492, 1500 (11th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 190, 93 L.Ed.2d 123 (1986). Here, the defendants fail to show that this omission was intentional or reckless. Along with Special Agent Ferreira's supplemental affidavit, affirming his lack of knowledge concerning the Union County prosecutor's electronic surveillance at that time, M.O.L. Of The United States In Opposition To Joint Motion Of Defendants To Suppress The Fruits Of Electronic Surveillances, Exhibit 3, the fact that the New York federal application meticulously cites a number of other prior electronic surveillances, including the federal Video Warehouse surveillance, suggests that the omission was unintentional. According, suppression is not required.

Defendants further argue that the quantity of simultaneous wiretaps authorized in the New York federal investigation precludes the possibility of a valid showing of exhaustion of alternative investigatory methods pursuant to § 2518(3)(c) for at least some of these wiretaps. They argue that at least some of the wiretaps are redundant because of the likelihood that many conversations could be simultaneously intercepted over two wiretapped

telephones when surveillance targets spoke to one another. In arguing redundancy, however, the defendants neglect to give sufficient consideration to the likelihood that significant conversations might be intercepted over these wiretaps that did not originate from any of the other wiretapped telephones. For each wiretap, probable cause and the need for electronic surveillance were properly demonstrated. Suppression is not warranted.

8. Defendants' Request for Orders and Applications for Surveillances at the Olympia Esposito Residence, the Smith Street Democratic Club, and Manhattan Social Clubs

a. The Olympia Esposito Residence 10-Day Reports

The government has agreed to provide the defendants with 10-day reports from the original Esposito surveillance that were incorporated by reference into the application for extension of the Esposito order. Letter from Bruce Repetto, Assistant United States Attorney, to Judge Stanley S. Brotman (August 12, 1987). It appears that this request is now moot.

b. The Democratic Club Applications and Orders

Defendants are not entitled to orders and applications relating to electronic surveillance at the Smith Street Democratic club because no defendant has standing to challenge those orders. It is undisputed that no defendant was named in these orders or intercepted pursuant to these orders. M.O.L. In Opposition (Electronic Surveillance) at 151, Exhibit 3. Therefore, the orders and applications need not be disclosed pursuant to § 2518(9).

Alderman v. United States, 394 U.S. 165, 171-72, 89 S.Ct. 961, 965-66, 22 L.Ed.2d 176 (1969).

c. The Manhattan Social Clubs Applications and Orders

Defendants are not entitled to orders and applications relating to electronic surveillance at two Manhattan social clubs. According to the representation of the government, which has not been disputed, no interceptions were obtained pursuant to these orders. Thus, defendants have not demonstrated their standing as "aggrieved persons" able to suppress these surveillances because they were intercepted, and no representation has been made that they own the premises that were surveilled. *United States v. Lanese,* 385 F.Supp. 525, 527 (N.D.Oh.1974) (citing 18 U.S.C §§ 2510(11), 2518(10)(a)); *cf. United States v. Torres,* 583 F.Supp. 86, 96 (N.D.Ill.1984), *rev'd on other grounds,* 751 F.2d 875 (7th Cir.1984) ("Only defendants who are overheard in an earlier interception are 'aggrieved persons' entitled to assert that a later interception was tainted by an earlier one."). Defendants' request for these materials is denied.

In summary, the court reserves on the defendants' motion to suppress electronic surveillance interceptions as it pertains to theft from interstate shipment (orders dated April 16, 1985, May 14, 1985, June 26, 1985, July 25, 1985), mail fraud/wire fraud – video duplicating (orders dated April 16, 1985, May 14, 1985, June 26, 1985, July 25, 1985), and mail fraud/wire fraud – "bust-out" (orders dated May 14, 1985, June 26, 1985, July 25, 1985); the motion is denied as to all other interceptions.

An appropriate order will be entered.

ORDER

This matter having been brought before the court on motions of defendants; and

The court having reviewed the submissions and oral argument of the parties; and

For the reasons expressed in this court's opinion filed this date

IT IS on this 1st day of September, 1987, hereby

ORDERED:

1. All motions be defendants to dismiss counts of the indictment are DENIED.

2. All motions be defendants to require the government to elect between offenses charged in individual counts, or to elect between counts, are DENIED.

3. Defendants' joint motion to strike surplusage from the indictment is GRANTED IN PART and DENIED IN PART.

4. Defendants' joint motion and individual motions to sever are GRANTED IN PART and DENIED IN PART; the matter is severed into seven separate trials; see Part III-A of the attached opinion.

5. The dates for the five trials involving the eleven non-RICO defendants commerce on October 13, 1987; the dates for the two trials of the ten RICO defendants commence on March 7, 1988. Counsel are to appear on September 8, 1987 at 9:30 a.m., in order to discuss the order

of trials; following the hearing, the court will issue a supplemental order listing trial dates and a schedule for pre-trial motions.

6. All motions to adjourn the trial dates are DENIED.

7. The motion of defendants Levy and Fisher to compel discovery is DENIED; the government is ordered to review the New York wiretap information, as described in the attached opinion, and to file the two requested reports with the court within fifteen (15) days of the date of this order.

8. Defendants' joint motion and individual motions for a bill of particulars are GRANTED IN PART and DENIED IN PART; any required *in camera* submissions by the government to be made within twenty (20) days of the date of this Order.

9. All other defense motions for pretrial hearings and discovery (proffer of single conspiracy); *James* hearing; evidentiary material (prior conduct, prior convictions, bad acts); and pretrial discovery (witness list, statements of nontestifying witnesses, grand jury information) are DENIED.

10. Defendants Vastola's motion to suppress the fruits of the search of his home is GRANTED IN PART and DENIED IN PART.

11. The motions to suppress fruits of a search, filed by defendants Brocco, Majuri, and Saka, are DENIED.

12. The court RESERVES decision on defendants' motion to suppress interceptions pertaining to theft from interstate shipment (orders dated April 16, 1985, May 14,

1985, June 26, 1985, July 25, 1985), mail/wire fraud – "bust-out" (orders dated May 14, 1985, June 26, 1985, July 25, 1985); counsel are hereby ORDERED to appear on September 8, 1987 at 9:30 a.m. for further argument as to suppression of the above noted interceptions; defendants' motion to suppress as to all other interceptions is DENIED.

13. Defendants' joint and individual motions for leave to file further pretrial motions is GRANTED only to the extent that such motions are necessitated by the relief provided by this order. A schedule will appear in a supplemental order subsequent to the September 8, 1987 hearing.

APPENDIX VIII

OPINION OF THE DISTRICT COURT

Dated April 28, 1989

On March 2, 1989, A jury convicted defendant Gaetano Vastola on counts one, two, three, four, and nine of the government's superseding indictment. The same jury returned guilty verdicts against defendant Saka on counts one, two, three, four, six, seven, nine and 12 through 26 of the same indictment. Both defendants were found not guilty on counts five, eight and 10 and defendant Vastola was acquitted on counts seven, 23, 24 and 26. Finally, the jury deadlocked as to Vastola on counts six and 11.

At the close of the government's case both defendants moved for judgments of acquittal pursuant to Federal Rule of Criminal Procedure 29(a) and the court denied those motions. At the close of defendants' case they both made renewed motions for judgments of acquittal and the court reserved its decision pursuant to rule 29(b). Now, defendant Saka has moved, pursuant to rule 29(c), for a judgment of acquittal on all counts on which he was convicted and defendant Vastola has similarly moved for a new trial, pursuant to Rule 33, on counts four and nine. For the reasons discussed below, the court will deny all of defendants' outstanding Rule 29 and Rule 33 motions, except for defendant Vastola's motion for a judgment of acquittal on count one. The court will vacate Vastola's conviction on count one and enter a judgment of acquittal.

Discussion.

A. The Rule 29 Motions.

In ruling on a motion for a judgment of acquittal, the court "must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt." *United States vs. Gross*, 375 F. Supp. 971, 973 (D.N.J.) (quoting *Curley vs. United States*, 160 F.2d 229, 232 (D.C. Cir. 1947)), affirmed, 511 F.2d 910 (3d Cir. 1974), *cert. denied*, 423 U.S. 924 (1975). In making its determination under Rule 29, the court must view the evidence in the light most favorable to the government and must give it the benefit of all legitimate inferences. *See United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir.), *cert. denied*, 469 U.S. 858 (1984) (citing *Glasser vs. United States*, 315 U.S. 60, 80 (1942)); *United States vs. Gross*, 375 F. Supp. at 973. *See also, United States vs. Pratt*, 429 F.2d 690 F. Supp. 1388 (E.D. Pa. 1983):

> If there is sufficient evidence in the record upon which a rational jury could find beyond a reasonable doubt that the government has proved all elements of the offenses charged, a motion for a judgment of acquittal may not be granted. *United States vs. Pratt*, 429 F.2d 690 (3d Cir. 1970); *United States vs. Doan*, 710 F.2d 124, 126-27 (3d Cir. 1983).

1. Defendant Vastola.

Count 1.

The jury convicted defendant Vastola on count one of the indictment which charged him with violating the

federal racketeering law, 18 United States Code section 1962(c). In order for the defendant to have been convicted under section 1962(c), as it was charged in the indictment, the jury must have found beyond a reasonable doubt that Vastola engaged in a "pattern of racketeering activity" which the court defined for the jury in its charge, at the request of the government, as follows:

To find that a defendant engaged in a "pattern of racketeering activity," you must find that he committed, or aided and abetted in the commission of at least two acts of racketeering activity, within ten years of each other, one of which must have ocurred after October 15, 1970. I note that his definition is taken directly from the Racketeering Statute itself, 18 United States Code section 1961(5).

In paragraph four of count one of the superseding indictment, the government set forth the four separate racketeering acts which Vastola was alleged to have committed. The first "racketeering act" charged by the government alleged that the defendant used and conspired to use "extortionate means to collect extensions of credit from Out of the Past, Ltd." It is crucial to note that the government also broke up this single "racketeering act" into four additional counts, counts four, five, nine and 10 with which it also charged Vastola. However, the government charged all four of these counts as a single racketeering act. The other three "rackeetering acts" were: conspiring to make extortionate loans and to use extortionate means to collect loans, also charged as separate offenses, under counts six and seven; an extortionate loan made to Daniel Zack, also count 11; and fraudulently

concealing and transferring property of Dispodype, Inc., to defeat the bankruptcy laws, also counts 24 and 26.

The jury returned guilty verdicts against defendant Vastola on counts one, two, three, the three RICO counts, and counts four and nine only. Vastola was acquitted on counts five, seven, eight, 10, 23, 24 and 26 and the jury deadlocked as to counts six and 11. Since counts four and nine were charged by the government as a single "racketeering act," and Vastola was not convicted on any of the other counts which make up the other racketeering acts, it is clear from the jury's verdict that it found that the defendant had committed only one of the four predicate acts alleged by the government under count one. Therefore, defendant Vastola's conviction cannot stand as to count one of the indictment and the court will enter a judgment of acquittal.

While I am hesitant to disturb a jury verdict in any case, it is clear that this one, on count one, must be vacated. The subsection of the RICO statute by its very language requires the commission of two "acts of racketeering" but in this case the jury unanimously found only one such act. To allow such a verdict to stand would be in direct contravention of the language and spirit of the racketeering statute. The government chose to hcarge the predicate acts the way it did, and it, and not the defendant must suffer the consequences of an unartfully drafted indictment or a failure of proof.

I note that the government's reliance on *United States vs. Powell*, 469 U.S. 57 (1984) and *Dunn vs. United States*, 284 U.S. 390 (1932), for the dproposition that the court

should not disturb an inconsistent jury verdict is misplaced. The government must recognize that the RICO law is a special animal which substantially expands the power of the United States to punish certain "paterns" of criminal activity. Furthermore, to find that a defendant engaged in a "pattern of racketeering activity" under section 1962(c) the jury must find at least two predicate acts. Congress specifically and explicitly wrote this requirement into the law; where there are not two predicate acts, as here, there can be no pattern of racketeering activity; and if there is no pattern of racketeering activity, the defendant cannot be convicted as charged in the indictment. In essence, the predicate acts are "building blocks" which make up the pattern of racketeering activity. Without the right number of "building blocks", in this case, it is impossible to build a RICO violation. Therefore, what we have in this case is not just an inconsistent verdict, but also a verdict that is a legal impossibility and this court will not close its eyes to such legal impossibilities.

The court is aware of only one case in which a court applied the logic in *Dunn* and *Powell* to the RICO statute. However, in that case, *United States vs. Tinsley*, 800 F.2d 449 (4th Cir. 1986), the Fourth Circuit Court of Appeals simply quoted at length from *Powell* without analyzing its application to the RICO statute. I am satisfied that such analysis would have convinced the court that the *Powell/Dunn* rule should not apply to a case such as this. Therefore, the court declines to follow *Tinsley* and will vacate defendant Vastola's conviction on count one and enter a judgment of acquittal.

B. Count 2.

Defendant Vastola makes two main arguments for why the court should enter a judgment of acquittal on count two. First, he asserts that counts one and two are multiplicitous and, thus, he should not have been charged and convicted of both. This court was confronted with this same argument in the pre-trial setting at which time it denied defendant's motion to force the government to choose between charging counts one and two. The court sees no reason to change its earlier ruling, especially in light of the fact that defendant's conviction on count one, the defendant makes the supplementary argument that the very charging of the multiplicitous counts somehow unduly prejudiced him in the eyes of the jury. In light of the gravity of the case as a whole, however, the court finds this argument to be without merit.

In addition, Vastola argues that the evidence adduced at trial was clearly insufficient to withstand a rule 29 motion. The court disagrees. In light of the above rule 29 standard, which is extremely deferential to the jury's ability to find facts, the court feels that the evidence was more than sufficient for a rational jury to find guilt beyond a reasonable doubt. This court sat through several weeks of testimony and has reviewed tapes, exhibits and the trial transcript and it is convinced that sufficient evidence was adduced on count two for a jury to convict the defendant.

As for Vastola's argument that proving only one unlawful debt is insufficient to establish a RICO violation, that contention is in direct contravention of the only case cited by either party which deals with the issue. In

United States vs. Pepe, 747 F.2d 632 (11th Cir. 1984), the Eleventh Circuit Court of Appeals held that, under 18 United States Code, section 1962(c), "To establish the collection of unlawful debt, only one act of collection must be shown." *Id.* at 645. Defendants have not provided this court with any case law refuting this holding and the court finds it to be the correct statement of the law, just as it charged the jury:

> I instruct you that you must be unanimous on at least one of the debts charged in the indictment to convict on this count. You must acquit the defendant if you are not unanimous on at least one of the charged debts.

Jury charge at 73.

Therefore, the court will deny defendant Vastola's motion for a judgment of acquittal on count two.

C. Count 3.

Defendant Vastola argues that his conviction on count three, the RICO conspiracy, was not supported by the weight of the evidence. Once again, after reviewing the trial transcript and exhibits, the court is forced to disagree. The court does not agree with the government that, somehow, *United States vs. Powell*, 469 U.S. 57 (1984), discussed above, estops the defendants from contesting, or the court from reviewing, Vastola's conviction on count three. However, given the special nature of proof required for a RICO conspiracy, *see e.g., United States vs. Adams*, 759 F.2d 1099 (3d Cir.), *cert. denied*, 474 U.S 971 (1985); *United States vs. Pepe*, 747 F.2d 632 (11th Cir. 1984),

the court finds that a rational jury could have found guilt beyond a reasonable doubt on count three. Therefore, the court will deny defendant Vastola's motion for a judgment of acquittal on count three.

2. Defendant Saka.

Defendant Saka moves this court for judgment of acquittal on each of the 22 counts on which he was convicted. In essence, Saka contends that there was insufficient evidence for him to have been convicted on any of the counts. The court finds that this position lacks any merit whatsoever.

After presiding over the trial and reviewing all the evidence in this case, the court is compelled to borrow a phrase from the government's brief and agree that "the evidence against Saka was overwhelming." One need only review the legion of tapes entered into evidence by the government to see that Saka was tried and convicted on his own words. In arguing that the evidence was insufficient, however, counsel for defendant Saka relies exclusively on the testimony of witnesses presented at trial. While the court disagrees with the argument of defendant concerning the interpretation of this witness testimony in any event, it also finds that the tape recordings of conversations between Saka and various other individuals painted a clear picture of Saka's involvement in, and culpability for, all of the charges of which he was convicted. Therefore, the court must deny the motion of defendant Saka for judgments of acquittal of each of the 22 counts of which he was convicted.

B. The Rule 33 motions.

The court, in evaluating a motion for a new trial, must "examine the weight, rather than the sufficiency of the evidence . . . ," *United States vs. Messerlain*, 633 F. Supp. 1493, 1513 (D.N.J. 1986) (citing *Tibbs vs. Florida*, 457 U.S. 31 (1982)), and, in doing so, the court may "assess the credibility of the witnesses." *United States vs. Clemons*, 658 F. Supp. 1116, 1119 (W.D. Pa. 1987). The court "need not view the evidence in the light most favorable to the verdict," *United States vs. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980), "but may set aside a verdict and grant a new trial only if it determines that the verdict constitutes a miscarriage of justice." *United States v. Mastro*, 570 F. Supp. 1388, 1390 (E.D. Pa. 1983) (citing *United States VBS. Phifer*, 400 F.Supp. 719, 723 (E.D. Pa. 1975), affirmed 532 F.2d 748 (3d Cir. 1976)).

In short, then, a new trial may be granted pursuant to Federal Rule of Criminal Procedure 33, "If there is a reasonable probability that the trial error could have had a substantial influence on the jury's decision." *Mastro*, 570 F. Supp. at 1388, citing *Government of the Virgin Islands vs. Bedford*, 671 F.2d 758, 762 (3d Cir. 1982)).

Defendant Vastola has moved for a new trial on counts four and nine, the conspiracy convictions. Basically, defendant argues that the jury was mislead and prejudiced by certain "organized crime" references made during the trial. These references include: (1) statements by certain agent-witnesses that they were members of certain "organized crime" task forces; (2) a taped conversation admitted into evidence in which defendant Saka used the word, "Mafia" to describe a certain group of

people, including claims defendant Vastola, for the purposes of this motion, Vastola himself; and (3) a statement by FBI agent Mahoney about John La Monte and his family being placed in FBI protective custody. Based on the standard set forth above, the court is compelled to deny defendant's motion.

Defendants are entitled to a fair trial, not a perfect one. *Delaware vs. Van Arsdall*, 475 U.S. 673, 681 (1986), citing *United States vs. Hasting*, 461 U.S. 499, 508-09 (1983), *cert. denied* 469 U.S. 1218 (1985)); *Bruton vs. United States*, 391 U.S. 123, 135 (1968). Throughout the course of this trial, the court made every effort to exclude from the jury's hearing explicit and implicit references to organized crime which the court felt to be irrelevant to the jury's determination of the defendant's guilt and potentially prejudicial to defendant's due process rights. The court feels that, on the whole, it succeeded in that endeavor. On the one occasion where a possibly prejudicial comment did find its way before the jury, when agent Mahoney inadvertently noted that John La Monte and his family were placed in protective custody, the court ordered the jury to disregard it:

Ladies and Gentlemen, you are to disregard the agent's testimony regarding the reasons why John La Monte's active cooperation ended and you should not consider it during your deliberations for any reason. I am ordering it stricken from the record read to the jury on February 22. 1989. The court must assume that the jury followed its admonition. Furthermore, to the extent that the above references could be seen as constituting trial error, their effect, taken by themselves or cumulatively, cannot be said to have so tainted the jury's deliberations

as to deprive defendant of a fair trial. Therefore, the court will deny Vastola's request for a new trial on counts four and nine.

The court will enter the following order:

The matter having come before the court on motions of defendant Gaetano Vastola and Elias Saka for judgment of acquittal, new trial pursuant to Federal Rule or Criminal Procedure 29 and 33 respectively, the court having considered the submissions of the parties and arguments of counsel, and for the reasons set forth in the court's opinion read into the record this date, it is on the 28th day of April hereby ordered that the motions of Gaetano Vastola for judgment of acquittal on count one of the superceding indictment is granted.

It is further ordered that motion of defendant Gaetano Vastola for a judgment of acquittal on counts two and three and for a new trial on counts four and nine is denied.

It is further ordered that the motion of defendants Elias Saka for acquittal of each of the counts of the superseding indictment is denied.

APPENDIX IX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5529

UNITED STATES OF AMERICA

v.

GAETANO VASTOLA,
Appellant

(D.C. Crim. No. 86-301)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ROTH and LEWIS, *Circuit Judges*, and VAN ANTWERPEN*, *District Judge*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the

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* As to panel rehearing only.

panel and the Court in banc, is denied. Judges Becker, Stapleton and Hutchinson would grant rehearing.

BY THE COURT,

/s/ _____
Circuit Judge

Dated: **June 16, 1994**

FILED
NOV 7 1994
OFFICE OF THE CLERK

No. 94-405

In the Supreme Court of the United States

OCTOBER TERM, 1994

GAETANO VASTOLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "satisfactory explanation" for a delay in sealing wiretap tape recordings, which is required by 18 U.S.C. 2518(8)(a) to justify admissibility of the tapes, may be offered and considered for the first time after conviction and remand to the district court.

2. Whether the requirement that the government prove a "satisfactory explanation" for the sealing delay was met in this case.

3. Whether petitioner's RICO conviction may be upheld despite inconsistent jury verdicts and the insufficiency of the evidence on some, but not all, of the predicate offenses charged.

4. Whether there was sufficient evidence to support petitioner's RICO conspiracy conviction.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-26) is reported at 25 F.3d 164. Previous court of appeals' opinions in this case are reported at 989 F.2d 1318 (Pet. App. 27-57), 915 F.2d 865 (Pet. App. 58-88), and 899 F.2d 211 (Pet. App. 89-162).

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1994. A petition for rehearing was denied on June 16, 1994. Pet. App. 306-307. The petition for a writ of certiorari was filed on September 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was a participant in the operation of an enterprise through which he committed various crimes, including extortion, schemes to defraud suppliers of businesses controlled by the enterprise, and insurance and bankruptcy fraud. Pet. App. 3, 31. The headquarters for the enterprise was petitioner's Video Warehouse in West Long Branch, New Jersey. *Id.* at 61a. On March 15, 1985, the government received district court authorization to conduct electronic surveillance at the warehouse until June 13, 1985. *Ibid.* Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518(8)(a), requires the immediate sealing of recordings of intercepted conversations "upon the expiration of the [intercept] order." The tapes generated from the surveillance of petitioner's warehouse were, however, not sealed until July 15, 1985. See Pet. App. at 3.

As a result of the investigation, petitioner was indicted in the United States District Court for the District of New Jersey, along with 20 co-defendants, in a 114-count indictment charging multiple violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, and other offenses. The district court denied a pretrial motion joined by all of the original defendants to suppress the tape recordings because of the delay in sealing. Relying on *United States* v. *Falcone*, 505 F.2d 478, 484 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975), the court held that suppression was not required as long as the integrity of the tape recordings was established. Because the defendants had not questioned the integrity of the tapes, the court found the tapes admissible. Pet. App. 285-286.

Following a jury trial, petitioner was found guilty of two substantive RICO offenses (Counts 1 and 2), in violation of 18 U.S.C. 1962(c); RICO conspiracy (Count 3), in violation of 18 U.S.C. 1962(d); conspiracy to use extortionate means to collect an extension of credit (Count 4), in violation of 18 U.S.C. 894; and conspiracy to obstruct commerce by means of extortion (Count 9), in violation of 18 U.S.C. 1951. Pet. App. 295, 47-48. The district court granted petitioner's post-verdict motion for a judgment of acquittal on the RICO offense charged in Count 1. *Id.* at 296-299. Petitioner was sentenced to 20 years' imprisonment and ordered to pay fines totalling $70,000. *Id.* at 3.

2. The court of appeals affirmed the district court's ruling admitting the wiretap tapes. In accordance with *Falcone*, the court of appeals found that suppression of the tapes was unwarranted, "notwithstanding the government's technical infraction of the custody requirements of the unsealing orders," in the absence of any "serious[] conten[tion] that the tapes were subject to tampering." Pet. App. 161. The court of appeals also reinstated the Count 1 RICO conviction, reversed petitioner's conviction on the Count 2 RICO offense, affirmed the other convictions, and remanded the case for resentencing. *Id.* at 161-162.

3. Thereafter, in *United States* v. *Ojeda Rios*, 495 U.S. 257 (1990), this Court rejected the argument that electronic surveillance tapes are admissible if the government can establish their integrity despite delays in sealing. The Court construed 18 U.S.C. 2518(8)(a) to require suppression in the absence of a "satisfactory explanation" for the delay, even when there is no question about the integrity of the tapes. 495 U.S. at 264-265. The Court agreed that the government had in this Court articulated a satisfactory explanation for the

delay, but "remanded for a determination whether the Government's explanation to the District Court substantially corresponds to the explanation it now advances." *Id.* at 267. In a concurring opinion, Justice O'Connor emphasized that the satisfactory explanation must be based on "findings made and evidence presented in the district court, rather than on a *post hoc* explanation given for the first time on appeal." *Id.* at 268.

Following its decision in *Ojeda Rios*, the Court granted certiorari in this case, vacated the Third Circuit's judgment, and remanded for further consideration. *Vastola* v. *United States*, 497 U.S. 1001 (1990).

4. On remand, the court of appeals observed that the government may have offered no explanation for its delay in sealing the tapes at the original suppression hearing because, "acting in reasonable reliance on *Falcone*, it assumed that it could defeat the suppression motion by demonstrating the integrity of the tapes and thus did not find it necessary to introduce evidence on this point." Pet. App. 84. The court remanded for the district court "to exercise its discretion" whether to allow the government to give a satisfactory explanation for the delay. *Id.* at 85. If the district court determined to permit the explanation, it was to hold a hearing in which the government would have the burden of proving that its explanation was the "*actual* reason for the sealing delay." *Id.* at 86. Petitioner's petition for a writ of certiorari from that decision was denied. *Vastola* v. *United States*, 498 U.S. 1120 (1991).

5. On remand from the court of appeals, the district court held that the government had not waived its opportunity to present a satisfactory explanation for the sealing delay because the remand was "the first time that the government has been afforded the opportunity to

present evidence on this issue as this court did not expect such evidence at the time of the sealing delay given the rule in *Falcone*." Pet. App. 190. Following an evidentiary hearing, the district court found that "the actual reason for the sealing delay was that the Assistant United States Attorney in charge of the electronic surveillance, Diana Armenakis, and her supervisor on the case, Thomas Roth, believed that the Wiretap Act did not require sealing until the end of the entire investigation." *Id.* at 198. The district court further found that Roth's and Armenakis's "interpretation of the statute was objectively reasonable at the time of the sealing delay" and thus "that the government [had] offered a 'satisfactory explanation' for the sealing delay." *Id.* at 201. The district court reinstated the Count 1 RICO conviction as directed by the court of appeals and resentenced petitioner to 17 years' imprisonment. See *id.* at 5.

On appeal from those district court rulings, the Third Circuit held that the district court acted within its discretion in providing the government the opportunity, on remand, to demonstrate that it had a satisfactory explanation for the sealing delay. Pet. App. 40. On the merits of that question, although the court of appeals believed that *Ojeda Rios* itself suggested that the government's misunderstanding of the law in this case was reasonable, the court was constrained by its recent decision in *United States* v. *Carson*, 969 F.2d 1480 (1992), to hold that the district court had erred in that respect. Pet. App. 44-45. *Carson* had held that it was not reasonable to conclude from the case law that tapes need not be sealed until the conclusion of the entire investigation. 969 F.2d at 1494. *Carson* further held, however, that even "[w]hen a government attorney's legal conclusion is found to be unreasonable, the explanation for the delay

would still be an objectively reasonable 'mistake of law' if the government can show that its attorney has adequately researched the law or has otherwise acted reasonably." Pet. App. 45. Applying that articulation of the "satisfactory explanation" requirement, the court remanded again to the district court for a determination whether the government attorneys' misunderstanding of the law was the result of reasonable research. *Id.* at 46.

Before remanding the case, the court considered petitioner's contention that the reentry of his conviction on the Count 1 substantive RICO count could not stand because of an inconsistency between the jury's verdicts and the difficulty in determining which of several predicate acts the jury had found. Pet. App. 47-56. Relying on *United States* v. *Powell*, 469 U.S. 57 (1984), and *Griffin* v. *United States*, 502 U.S. 46 (1991), the court of appeals held that the existence of sufficient evidence to support two of the four predicate acts alleged in Count 1 was adequate to sustain petitioner's conviction on that count. Pet. App. 55.

On remand to reconsider the government's explanation for the sealing delay, the district court concluded that Armenakis "acted reasonably under the circumstances." Pet. App. 173. While her "reading and outlining the statute and reviewing the relevant annotations" was not sufficient, the court noted that Armenakis also had "her understanding of the sealing requirement confirmed by the advice of more experienced lawyers in the United States Attorneys Office." *Id.* at 174. The court concluded that "Armenakis' reliance on authoritative advice given by her colleagues constituted an adequate substitute for further reading of the caselaw, and her behavior was objectively reasonable under the circumstances." *Id.* at 175.

6. The court of appeals upheld the district court's conclusion that the combination of Armenakis's own legal research and the confirmation of that research by experienced colleagues rendered Armenakis' conduct objectively reasonable and that the government had therefore presented a satisfactory explanation for the sealing delay. Pet. App. 9-10. The court emphasized that an "inquiry into the reasonableness of an attorney's legal research is necessarily fact and time specific" and that, before the clarification of the law by *Ojeda Rios*, a reasonably prudent attorney could reach the understanding held by Armenakis in this case. *Id.* at 10-11.

Judge Stapleton dissented. He agreed with the majority's statement of the relevant legal principles, but he believed that the government had failed to sustain its burden of showing that Armenakis had reasonably relied on the confirming views of her colleagues, in addition to her legal research. Pet. App. 25-26.

ARGUMENT

1. Petitioner argues (Pet. 13-16, 20-21) that, under 18 U.S.C. 2518(8)(a), the government must offer its explanation for a sealing delay before admission of the tapes. In petitioner's view, the court of appeals erred by giving the district court discretion to allow the government to present its explanation for the sealing delay on remand. That claim lacks merit.

Section 2518(8)(a) provides that "[t]he presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom." The statute requires the government to explain a sealing delay in order to make use of the tapes, but it does not provide that a failure to offer

the explanation before the introduction of the tapes precludes the tapes' admissibility. A satisfactory explanation is a "prerequisite" for use of the tapes, but the statute does not state that it must precede use of the tapes. Cf. *Batson* v. *Kentucky*, 476 U.S. 79, 100 (1986) (race-neutral explanation is a prerequisite for sustaining a peremptory challenge after a prima facie case of discrimination is shown; remanding for post-trial proceeding to evaluate whether a prima facie case existed and, if so, whether government's explanation is satisfactory).

Ojeda Rios does not support petitioner's view of the statute. In that case, the government, as required under Second Circuit law, offered an explanation for the sealing delay at the suppression hearing; the question that this Court left open was whether the explanation at trial corresponded to the explanation that this Court had determined to be "satisfactory" under the statute. The Court stated: "A 'satisfactory explanation' within the meaning of § 2518(8)(a) cannot merely be a reasonable excuse for the delay presented at the appellate level. Rather, our review of the sufficiency of the Government's explanation for a delay should be based on the evidence presented and submissions made in the District Court." 495 U.S. at 267.

Consistent with *Ojeda Rios*, the Third Circuit required that the government's proffered reason for the sealing delay be the actual reason for the delay. Pet. App. 86. Despite petitioner's contrary understanding, *Ojeda Rios* did not hold that the actual explanation for the delay must be made on the record before the tapes are admitted. That timing issue was not raised in *Ojeda Rios*, because an explanation had been offered at the suppression hearing.

Petitioner does not cite any case accepting his view that Section 2518(8)(a) requires the satisfactory explanation for a sealing delay to be lodged in the record before admission of the tapes into evidence, and we have discovered no other case dealing with that issue. Moreover, the issue is unlikely to arise in the future because *Ojeda Rios* makes it plain that sealing delays must be explained by the government regardless of the authenticity of the tapes. The issue, therefore, does not warrant this Court's review.

Petitioner also claims (Pet. 16-20) that the district court erred in holding that the government had a valid reason for failing to explain the sealing delay at the suppression hearing. He asserts that any reliance on *Falcone* for that purpose was unreasonable. Whether the district court's interpretation of Third Circuit law in 1985 was correct, as we maintain, or erroneous, as petitioner contends, is not an issue of general application or continuing importance.

2. Petitioner next argues (Pet. 22-23) that the court of appeals misinterpreted *Ojeda Rios* by holding that a "satisfactory explanation" for a sealing delay exists when the responsible attorney has acted reasonably despite arriving at an unreasonable interpretation of the law. In *Ojeda Rios*, the explanation offered for the sealing delay was virtually the same explanation offered in this case, that the responsible attorney "believed that he was not required to seek sealing of the tapes until there was a meaningful hiatus in the investigation as a whole." 495 U.S. at 266. This Court concluded that although that explanation was legally incorrect, it was "objectively reasonable at the time" and thus would constitute a "satisfactory explanation" under the statute if it was in fact the actual reason for the sealing delay. *Ibid.* The court of appeals in this case recognized the

force of the argument that *Ojeda Rios* had already determined that the explanation offered in this case was a "satisfactory explanation." Pet. App. 44-45. But the panel here was constrained to apply the analysis employed in a previous Third Circuit case, *United States* v. *Carson*, *supra*. *Carson* concluded that the view that tapes need not be sealed until the conclusion of an investigation was an unreasonable interpretation of the law, but held that the conduct leading to such a mistake of law "is objectively reasonable * * * when the attorney involved acted as a 'reasonably prudent' attorney would to investigate the legal question involved in a reasonably prudent manner." 969 F.2d at 1494.

Applying the *Carson* analysis, the court of appeals in this case demanded both a showing that the responsible attorney believed that sealing was not required until conclusion of the investigation and proof that the attorney's understanding of the law was the product of a reasonably prudent investigation. Although we believe that this two-part standard is more stringent than that required by *Ojeda Rios*, the result in this case does not conflict with *Ojeda Rios*'s holding that a mistake of law resulting in a sealing delay is a "satisfactory explanation" if it was "objectively reasonable at the time."

Petitioner argues (Pet. 24), as did the dissent in the court of appeals, that the government did not sustain its burden of proving that Diana Armenakis conducted a reasonably prudent investigation by her combination of legal research and confirmation of her understanding with experienced colleagues. The court's decision was correct, and petitioner's disagreement with that fact-bound ruling does not present a question of general importance.

3. Petitioner argues (Pet. 24-27) that the court of appeals erred in upholding his conviction on the Count 1

RICO offense (which necessitated a finding of two predicate acts), when (1) that conviction was inconsistent with the jury's acquittal of petitioner on all but one of the separately charged predicate acts and (2) it was not clear on which second predicate act the jury based the RICO conviction. There is no merit to petitioner's contention.

In *United States* v. *Powell*, *supra*, this Court held that a conviction cannot be attacked on the ground that it is inconsistent with the jury's verdicts on other counts. In *Griffin* v. *United States*, *supra*, this Court held that a conviction on a multiple object conspiracy will be upheld if there is sufficient evidence to support at least one object, even if the general jury verdict does not identify which of the objects the jury found. Despite petitioner's contrary assertion (Pet. 26-27), *Powell* and *Griffin* reflect corollaries of the same principle: each count of conviction is reviewed for the sufficiency of the evidence to support it, without speculation about how the jury arrived at its verdict. In this case, the conviction on the Count 1 substantive RICO charge was supported by sufficient evidence on two of the four alleged predicate acts. Petitioner does not contend to the contrary. Under *Powell* and *Griffin*, the court of appeals correctly upheld that conviction.

4. Finally, petitioner invites (Pet. 27-30) the Court to use this case as a vehicle for clarifying the elements of a RICO conspiracy. He points out that the court of appeals reversed his Count 2 substantive RICO conviction for conducting a criminal enterprise by participating in an unlawful debt collection from Joseph Dwek, based on insufficient evidence that petitioner actually participated in the collection of that debt, but that the court nevertheless affirmed his RICO conspiracy conviction on Count 3 for conspiring to conduct

the criminal enterprise through the collection of the Dwek debt and affirmed his Count 1 substantive RICO conviction, one of the predicate acts of which was petitioner's conspiracy to use extortion to collect loans, including the Dwek debt. Petitioner asserts (Pet. 28-29) that these holdings raise three interrelated questions: (1) whether there is a distinction between *conducting* an enterprise by participating with other persons in the collection of an unlawful debt and *conspiring* with those persons to conduct an enterprise through collection of that unlawful debt; (2) whether to be convicted of RICO conspiracy a person must agree to commit personally a predicate act or merely agree to the commission of the act, a question on which petitioner correctly cites a conflict among the circuits (Pet. 28 n.7); and (3) whether a conspiracy offense may be a predicate act for a RICO conspiracy.

a. On the facts of this case, the distinction between conducting an enterprise by participating with others in the collection of an unlawful debt and conspiring with those others to conduct an enterprise through collection of that unlawful debt. On the facts here, the distinction is straightforward. For petitioner to be guilty of the predicate substantive offense of collection of an unlawful debt, he must participate in that predicate offense directly or as an aider and abetter. Because the evidence was insufficient to prove that petitioner participated in the collection of the Dwek debt, he was acquitted of the Count 2 substantive RICO offense that was based on that predicate substantive offense. The court of appeals correctly held that such acquittal was not inconsistent with petitioner's Count 3 RICO conspiracy conviction, which was based on the same predicate substantive debt-collection offense, because the evidence showed that petitioner agreed to conduct the affairs of the enterprise

through collection of the unlawful debt, although it showed that he agreed that someone else, not he, would collect that debt. See *United States* v. *Shabani*, No. 93-981 (Nov. 1, 1994), slip. op. 7 (gist of conspiracy offense is the agreement).

In addition, petitioner's conviction of the Count 3 conspiracy is subject to affirmance on alternative grounds. As discussed below, it is plain from the most recent court of appeals affirmance of petitioner's Count 1 substantive RICO conviction that petitioner's Count 3 RICO con-spiracy conviction would be affirmed based on the pattern of racketeering activity established by his underlying conspiracy offenses, without regard to the collection of the Dwek debt.

b. Petitioner's second question—whether a RICO conspirator must agree to commit personally a predicate act or merely agree to the commission of that act—is not squarely presented in this case. The jury indicated by a special interrogatory that petitioner's RICO conspiracy conviction (Count 3) was based both on the pattern of racketeering activity alleged in Count 1 and on the collection of various unlawful debts enumerated in Count 2. See Pet. App. 125-126. When the court of appeals affirmed petitioner's Count 3 RICO conspiracy conviction, this Court had not yet decided *Griffin* v. *United States*, *supra*. The court of appeals felt constrained at that time to examine only the collection of the Dwek debt as the predicate for the RICO conspiracy conviction, because of uncertainty under pre-*Griffin* case law whether petitioner's Count 1 conviction (which was prosecuted on the basis of four predicates, only two of which were supported by sufficient evidence) could serve as a valid predicate. See Pet. App. 120 n.17, 126-129. But when, after *Griffin*, the court of appeals most recently affirmed petitioner's Count 1 substantive RICO

racketeering based on two of the predicate acts alleged in Count 1, both of which were conspiracy offenses. See Pet. App. 55-56. Petitioner's Count 3 RICO conspiracy conviction is thus supported independently by a pattern of two predicate conspiracy offenses, in each of which petitioner personally participated as a conspirator. Accordingly, even if, as petitioner suggests, the majority rule accepted by the Third Circuit—that a RICO conspirator need not agree to participate personally in the predicate acts—is wrong, the result in this case would not be different.

c. The third of petitioner's questions—whether a conspiracy offense may be a RICO predicate act—is answered in the affirmative by the statute and does not warrant review. As the Third Circuit held in *United States* v. *Pungitore*, 910 F.2d 1084, 1134-1135 (1990), cert. denied, 500 U.S. 915 (1991), the definitions of "racketeering activity" in 18 U.S.C. 1961(1)(A) and (D) (1988 & Supp. IV 1992), which are phrased, respectively, in terms of "any act or threat involving" or "any offense involving" various types of criminal activities, clearly encompass the crimes of conspiracy to commit the enumerated substantive offenses. Accord *United States* v. *Manzella*, 782 F.2d 533, 537-538 (5th Cir.), cert. denied, 476 U.S. 1123 (1986); *United States* v. *Ruggiero*, 726 F.2d 913, 918-919 (2d Cir.), cert. denied, 469 U.S. 831 (1984). Petitioner has cited no conflicting decisions on this question, and we have discovered none.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 94-405

In The

Supreme Court of the United States

October Term, 1994

GAETANO VASTOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. "A satisfactory explanation is a 'prerequisite' for use of the tapes, but the statute does not state that it must precede use of the tapes." (Brf. in Opp. at 8) On this opaque reasoning rests the Government's contention that it does not violate the plain language of 18 U.S.C. § 2518(8)(a) to permit the prosecution to supply the explanation for a sealing delay after the tapes have already been used to obtain a conviction – indeed years later, following appeal. But the noun "prerequisite" is universally understood to mean something that is "[r]equired or necessary as a *prior* condition." *The American Heritage Dictionary of The English Language* 1431 (3d ed. 1992) (emphasis added); *see also The New Shorter Oxford English Dictionary* 2338 (1993) ("A thing required as a prior condition"). Thus, § 2518's provision that "[t]he presence of the seal provided for by this section, or a

satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom" necessarily means that the explanation must precede the use.

The Government's curious, if not desperate, citation to *Batson v. Kentucky*, 476 U.S. 79 (1986), as sole purported support for its rather amazing position that "prerequisite" does not mean precede is testament to the hollowness of that position. *Batson*, of course, had nothing to do with statutory requirements and, even by analogy, is wholly inapplicable to the situation here where the command of § 2518 controls. Moreover, the word "prerequisite" appears nowhere in *Batson*, nor is the concept considered. True, in *Batson*, where "the trial court flatly rejected the [defendant's] objection without requiring the prosecutor to give an explanation," *id.* at 100, the matter was remanded for the trial court to decide if the facts established a prima facie case of purposeful discrimination and, if so, to reverse the conviction if the prosecutor did not come forward with a neutral explanation for his peremptory challenges. *Id.* But that is nothing like what happened in this case, where the Government had every opportunity before trial to provide an explanation for the sealing delay.

Here the defendant moved in writing prior to trial to suppress the tapes at issue on the grounds that the Government had failed either to submit them immediately to a judge for sealing or to provide a satisfactory explanation for not doing so as required by § 2518. The Government submitted a written response, yet, even though put on notice that a satisfactory explanation for the delay was required, chose not to provide one, arguing instead that a delay in sealing tapes is not grounds for suppression as long as the integrity of the tape recordings is preserved. The district court, *after* reviewing the submissions, agreed with the Government that "the integrity of the tapes has not been questioned, and thus suppression is not mandated." App. 286. Thus the district court did nothing at all

either to impair the Government from providing the explanation or to render providing an explanation academic.

Since the Government had the opportunity, as well as the obligation, to provide the explanation, the court's *subsequent* decision did nothing to vitiate that opportunity. The district court's statement in its opinion on remand that the remand was "the first time the government has been afforded the opportunity to present evidence on the issue as this court did not expect such evidence at the time of the sealing delay" – which statement, not surprisingly, is quoted at pages 4-5 of the Brief in Opposition – is inaccurate at best and revisionist at worst. An explanation was required by the statute and demanded by the defendant's motion; it was in no way contingent upon the court's expectations.[1] Indeed, the Government chose not to provide the explanation well before the court even considered the defendant's motion. Thus, the citing of *Batson* is misplaced.[2]

Unable to reconcile this case with the plain language of § 2518, the Government apparently feels more secure in arguing that *United States v. Ojeda Rios*, 495 U.S. 257 (1990), "does not support petitioner's view of the statute." (Brf. in Opp. at 8) Even if that statement were true, the terms of the statute would nevertheless control. But it

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[1] Moreover, it is Petitioner's position that, under § 2518(8)(a), an explanation for a sealing delay is a prerequisite to the use of tapes even if a defendant never moves to suppress the evidence. *See* Pet. at 17.

[2] A better lesson to be drawn from the *Batson* line of cases is that belated acceptance of a prosecutor's reasons for suspect peremptory challenges "risks infecting what would have been the prosecutor's spontaneous explanations with contrived rationalizations," and reserving decision until after trial "may create a subtle pressure for even the most creative district judge to accept explanations of borderline plausibility to avoid the only relief then available, a new trial." *United States v. Biaggi*, 909 F.2d 662, 679 (2d Cir. 1990).

is not true. While the facts of *Ojeda Rios* are indeed distinguishable since the prosecutor there did offer an explanation for the sealing delay as a prerequisite for use of the tapes, and while it is true as a technical matter that the timing issue was not raised in *Ojeda Rios* and therefore the Court did not "hold" that the actual explanation for the delay must be made on the record before the tapes are admitted (Brf. in Opp. at 8), that conclusion is a necessary implication of the Court's holding. The Court expressly noted that "[s]ection 2518(8)(a) has an explicit exclusionary remedy for noncompliance with the sealing requirement, providing that '[t]he presence of the seal provided for by this section, or a satisfactory explanation for the absence thereof, *shall be a prerequisite* for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom. . . . ' " 495 U.S. at 260 (footnote omitted) (emphasis added), *quoting* § 2518(8)(a). Thus, unless the illogic of the Government's "prerequisite-doesn't-mean-precede theory" can be imputed to this Court, *Ojeda Rios* certainly does "support petitioner's view of the statute."

Moreover, in remanding the case before it for further proceedings, the *Ojeda Rios* Court stated that the explanation offered to the Court "is not 'satisfactory' within the meaning of the statute unless it was relied on *at the suppression hearing* to explain the sealing delays." *Id.* at 267 (emphasis added). And finally, although obviously not the "holding" of the Court, the concurring justices emphasized that the "satisfactory explanation" must be the actual reason for the delay presented to the district court, not a *post hoc* explanation. *Id.* at 267-68. Thus, again, *Ojeda Rios* supports Petitioner's view of the statute.

The merit of Petitioner's claim is thus compelling, and the Solicitor General's response is uncharacteristically feeble, yet the Government would brush this issue under the rug by having the Court deny certiorari because "the issue is unlikely to arise in the future." (Brf. in Opp. at 9) Assuming the Government's prediction is

true, that would be a weighty consideration in an ordinary case. But this is not such a case, and the Court may grant certiorari "when there are special and important reasons therefor." Sup. Ct. R. 10(1). This case is before the Court for the th time. On Petitioner's first petition, following the initial affirmance of his conviction, the Court granted the petition, vacated the judgment and remanded the case to the court of appeals for further consideration in light of *Ojeda Rios*. *Vastola v. United States*, 497 U.S. 1001 (1990). When the court of appeals held on remand that whether the Government could provide a *post hoc* explanation for the sealing delay was a matter left to the district court's discretion, Petitioner brought his second petition, raising the very question at issue now and asserting that the court of appeals had failed to heed *Ojeda Rios* as directed by this Court. (Pet. in No. 90-907 at 9) The Solicitor General responded that the question was not ripe for review, since the district court might agree with Petitioner that the Government was foreclosed from providing an explanation for the sealing delay on remand, and in the event the courts below disagreed with Petitioner he would be free to petition this Court. (Brf. in Opp. in No. 90-907 at 5-6) That event having come to pass, the Government now says, "Why bother?"

In *Hutto v. Davis*, 454 U.S. 370 (1982), the Court had remanded the case to the court of appeals for reconsideration in light of the Court's intervening decision in *Rummel v. Estelle*, 445 U.S. 263 (1990), but the court of appeals adhered to its original affirmance. *Id.* at 372. In a per curiam decision, this Court then reversed "[b]ecause the Court of Appeals failed to heed our decision in *Rummel*." *Id.* The Court acknowledged that arguments might be made one way or the other whether the case before it was distinguishable from *Rummel*, *id.* at 375, but cautioned that "unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be

followed by lower federal courts no matter how misguided the judges of those courts may think it to be."[3] *Id.* *See also Powell v. Texas*, 492 U.S. 680, 681 (1989) (where this Court remanded for further consideration in light of intervening decision, Texas court's adherence to affirmance reversed, because "inconsistent with" intervening decision); *Yates v. Aiken*, 484 U.S. 211, 214 (1988) (reversing judgment after granting certiorari "because we are concerned that the South Carolina Supreme Court had not fully complied with our mandate" for further consideration in light of intervening decision).

This Court's initial grant of certiorari to Petitioner Vastola is rendered meaningless if on remand the court of appeals is permitted to disregard the plain thrust of *Ojeda Rios* and ignore the plain language of 18 U.S.C. § 2518 and if, when Petitioner seeks the redress which the Solicitor General has previously asserted would be open to him, the Government can prevail on an argument that this issue is unworthy of review because "unlikely to arise in the future." That result is particularly odious where the Government's position on the merits is so shallow.

2. The Government is doubly wrong in maintaining that the court of appeals assessed the government attorney's explanation for the sealing delay under a "more stringent" standard than required by *Ojeda Rios* and that the result reached did not in any event conflict with *Ojeda Rios'* holding that a mistake of law resulting in a sealing delay is a "satisfactory" explanation if it was "objectively reasonable at the time." (Brf. in Opp. at 10) The court of appeals' standard was *less* stringent, not more so, because even after expressly finding that the mistake of law was *not* objectively reasonable – which would require suppression under *Ojeda Rios* – the court went on to find that the explanation was "satisfactory" anyway because the

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[3] Here it appears that the court of appeals may indeed have considered *Ojeda Rios* "misguided." *See* Petition at 15 n. 3 discussing the court of appeals' footnote at App. 83 n. 18.

objectively unreasonable mistake of law had been arrived at reasonably. That the court may have felt "constrained" by its own precedent, *United States v. Carson*, 969 F.2d 1480 (3d Cir. 1992), to arrive at this wrong-headed result is immaterial to whether this Court should review that seriously flawed determination.

3. The Government sees nothing wrong in the combined application of the holdings of *Powell v. United States*, 469 U.S. 57 (1984), and *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466 (1991), since they reflect corollaries of the same principle: that each count of an indictment is reviewed for sufficiency of the evidence supporting it without regard to how the jury arrived at its verdict. (Brf. in Opp. at 11) That *Powell* and *Griffin* may reflect corollaries of this principle – which greatly oversimplifies those decisions – does not answer the question whether it is appropriate to apply them in tandem. Both *Powell* and *Griffin* involved an assessment of *probabilities*: in *Powell* that it was "equally possible" the jury's inconsistent verdicts benefitted the defendant, not the prosecution, 469 U.S. at 65; in *Griffin* that, even though a general verdict gives no assurance that the jury convicted on a ground unsupported by sufficient evidence rather than a sufficiently supported alternate ground, the chance was "remote." 112 S.Ct. at 469, 474. Given those probabilities – and such prudential considerations as the prosecution's inability to appeal an inconsistent verdict or an acquittal – inconsistent verdicts should not be reviewable, *Powell*, 469 U.S. at 65-66, and general verdicts are valid so long as legally supportable on one of the grounds submitted, *Griffin*, 112 S.Ct. at 469.

But these probabilities do not hold up when *Powell* and *Griffin* are applied one atop the other to sustain a verdict that is *both* inconsistent and supported by at least one ground that is invalid. *Griffin* assumes jury *rationality*: that jurors' "own intelligence and expertise" will save them from relying on the factually inadequate ground. 112 S.Ct. at 474. *Powell*, on the other hand, acknowledges the *irrationality* of inconsistent verdicts.

469 U.S. at 478. Thus, the chance is no longer "remote" that the jury relied on the invalid ground, because the inconsistent verdict is evidence that the jury did not act rationally. While there must necessarily be some speculation in this analysis – indeed in every case of trial error there is speculation whether it affected the verdict – it is warranted where, as here, the verdict is *doubly* flawed.[4]

4. The Government argues that the court of appeals' later affirmance of Petitioner's Count 1 RICO substantive conviction provides alternate grounds for affirming his Count 3 RICO conspiracy conviction, without regard to the collection of the Dwek debt and irrespective of whether the court of appeals is correct that a RICO conspirator need not agree to participate personally in the predicate acts. (Brf. in Opp. at 12-14) The court of appeals' affirmance of the Count 1 RICO substantive conviction, however, rests on the court's combined application of the holdings of *Powell v. United States* and *Griffin v. United States*. If this Court agrees with Petitioner that

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[4] The Government states that the conviction on the Count 1 substantive RICO charge was supported by sufficient evidence on two of the four alleged predicate acts and "Petitioner does not contend to the contrary." (Brf. in Opp. at 11) Petitioner did contend to the contrary in the court of appeals and has not abandoned that position, but it is not material to the legal question presented.

Petitioner also wishes to correct the misstatement in the opening sentence of the "Statement" in the Government's brief, which reports that Petitioner "committed various crimes, including extortion, schemes to defraud suppliers, and insurance and bankruptcy fraud." (Brf. in Opp. at 2) Although Petitioner's *co-defendant* was charged with schemes to defraud suppliers and with insurance fraud, Petitioner was not. As to bankruptcy fraud, Petitioner was *acquitted* of those charges. As to extortion, the jury found Petitioner guilty of conspiring to make and to collect one extortionate extension of credit (a business loan), but did not find him guilty of the substantive offenses.

those holdings should not be applied in tandem, no alternate grounds for affirming the Count 3 RICO conspiracy conviction would exist, and the questions raised by Petitioner regarding that conviction should be addressed.

The Government, citing *United States v. Shabani*, No. 93-981 (Nov. 1, 1994), may correctly distinguish between the offense of collection of an unlawful debt, which requires that the defendant participate in the collection directly or as an aider and abetter, and the offense of conspiracy to collect an unlawful debt, which requires only an agreement to collect the debt, not participation in the collection itself. (*See* Brf. in Opp. at 12-13) But the distinction between a RICO substantive offense, as to which the court of appeals found the evidence insufficient, and a RICO conspiracy, as to which the court of appeals found the evidence sufficient, based on the same predicate offense of collection of an unlawful debt, is lacking.

If Petitioner did not participate in the collection either directly or as an aider and abetter – which the court of appeals necessarily found in concluding that the evidence of the Count 2 substantive RICO offense was insufficient – then he could not have been convicted of the Count 3 RICO conspiracy. This is so because Count 3 of the indictment alleged a RICO conspiracy "through the collection of unlawful debt, as set forth in paragraph 2 of Count 2," and paragraph 2 of Count 2 alleged a RICO substantive offense "through the collection and attempted collection of unlawful debts," *not* through *conspiring* to collect the debts. Consequently, the Government is wrong in arguing that the Count 3 conviction is valid "because the evidence showed that petitioner agreed to conduct the affairs of the enterprise through collection of the unlawful debt, although it showed that he *agreed* that someone else, not he would collect that debt." (Brf. in Opp. at 12-13; emphasis added.) The court of appeals found that Petitioner did not participate in the collection of the debt directly or as an aider and abetter,

and mere *agreement* to collection of the debt was not charged in the indictment as an eligible predicate offense.

To the extent the Government is arguing, and the court of appeals held, that the agreement to collection of the unlawful debt served double duty to establish both a predicate conspiracy – albeit not one charged in the indictment as a predicate – and a RICO conspiracy, the Court should grant certiorari to decide whether this is permissible.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
November 16, 1994

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